MISSISSIPPI PRACTICE SERIES

Mississippi Model Jury Instructions

Civil

Mississippi Judicial College
2020-2021 Edition

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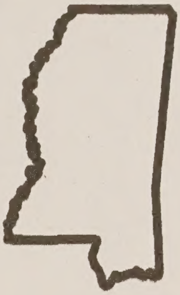
Mississippi Model Jury Instructions



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2020-2021 Edition
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FOREWORD

The Mississippi Judicial College was established at The University of Mississippi Law Center in 1970 to provide supporting services to the Mississippi judicial system. These services include continuing education opportunities for judges and other court officials, research assistance to the judiciary, and the publication of manuals, handbooks and other materials of value to the judiciary and to the legal profession. Funded by special assessments on civil case filings and criminal penalties, the College has won national recognition as a model judicial education program.

In the foreword to the 1977 edition of the Mississippi Model Jury Instructions, Dean Parham Williams stated that "the most important publication project undertaken thus far by the Judicial College is the preparation of model jury instructions for use in civil and criminal cases." This observation applies equally well after all these years to this revised edition. The preparation of these instructions proceeded in a carefully organized manner, with drafting committees appointed to prepare the text of the instructions. The committees were supported in their work by the staff of the Judicial College under the supervision of its Director, Krista R. Johns, and by Ryan Hood, Special Assistant Attorney General, who served as reporter to the committees.

The finished product is a significant achievement, one that will enable all of those involved in the court system, judges and lawyers alike, to perform their duties in a more efficient manner. All who participated in the planning and preparation of these model instructions should take pride in the contribution they have made to the more effective functioning of our judicial system.

Samuel M. Davis, Director
The University of Mississippi
Law Center

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I. ISSUE-BY-ISSUE INSTRUCTIONS: INTRODUCTORY; CONDUCT OF CIVIL TRIALS

§ 1:1 Voir dire

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.   Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

We will now begin the jury selection process in the case for today. During this process you will be asked some questions, and these questions are not intended to pry into your personal affairs in open court or embarrass anyone, and if you would like to give your answer up here at the bench, you may do so. The questions normally are asked to the panel as a whole and when a question requires a specific answer from you, you will need to raise your hand so we can call on you for your answer.

The case for today is a civil case and in that type of case a claim is being made by one party against another party. In the case for today a claim is being made by ________, who for the purpose of this trial will be called the plaintiff. The attorney representing the plaintiff for the trial is ________. The claim is one for ________ and is being made against ________, who for the purpose of this trial will be called the defendant, and the attorney representing the defendant for the trial is ________.

The basic allegations of the case are:

1. ________ Has anyone on the panel heard or know anything about the case?

2. ________ Has anyone on the panel, or have close family members, been involved in a case similar to this where that involvement might affect their decision in this case?

3. ________ Has anyone on the panel had any social, business, or personal relationship with either of the parties or with their attorneys?

In a case such as this, there are two important principles that must be followed:

(1) One of them is that both sides are entitled to a trial by an impartial jury. That is a jury that has no preconceived notions about the case for either side, and keeps an open mind throughout the entire trial of the case until it is submitted for your decision, and then bases its decision only on the evidence and law you are allowed to consider. Does anyone have a problem doing that in the case for today?

(2) The second principle is that both sides are entitled to a fair trial. To ensure a fair trial, there are certain rules that the trial will be conducted under. These are rules of evidence, rules of procedure and rules of law and from time to time these rules may prevent you from hearing what you want to hear, or what you think you should be allowed to hear; sometimes these rules will cause you to be inconvenienced by having to retire to the jury room while we take up questions about these rules outside your presence; sometimes they may be rules that you disagree with and do not think are good rules. However, if you are selected on the jury for this case, you will be required to follow all of these rules. Does anyone have a problem doing that in the case for today?

Finally, is there anyone on the panel who for any reason, a pressing personal matter, a health reason, or critical business matter cannot devote your full attention to the trial for today?

§ 1:2 General introductory instructions—Civil cases

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Members of the jury, at this time I will give you some preliminary instructions.

You have been selected as the jury to try this case. As jurors, you will hear the evidence and decide the disputed issues of fact, apply the law to the facts, and in this way render a verdict.

It is my duty to ensure that the trial is conducted in a fair and orderly manner. I will rule on any objections or motions and will instruct you on the law applicable to this case, and you are required to follow the law as given by the Court.

You should give careful attention to the testimony and evidence presented during the trial, but you should not form or express any opinion about the case one way or the other until you have heard all of the evidence and have the benefit of the instructions of law and the closing arguments of the attorneys.

To avoid any appearance of impropriety, you are prohibited from having any conversation with the attorney or anyone else connected with the case. You must not discuss the case with anyone during the trial, not even among yourselves. If anyone should attempt to discuss the case with you or within your hearing, you are to immediately move away and report the matter to me or to the bailiff.

The reason for these precautions is that it is your duty to decide this case solely on the basis of the testimony and evidence presented here in open court and not on some matter gathered outside the courtroom.

During the trial, I may be required to rule on motions or objections made by the lawyers. You should not infer from my rulings or from anything I may say or do that I have any opinion on the merits of the case favoring one side or the other.

It may be necessary that I conduct some of the hearings on objections or motions outside your presence. I will try to estimate the time needed for each hearing and for recesses, but frequently they last longer than we estimate because new issues arise. Your patience and understanding will contribute to a fair and orderly trial even though it may seem to go slowly.

Sitting and listening attentively for a long period of time may be a new experience for some of you. If you feel you need a rest break, do not hesitate to ask for a recess.

The next stage of the trial is opening statements of counsel. They are given the opportunity to explain the issues and summarize the facts they expect the evidence to show. What they say is not evidence, but you should listen closely so you will understand what the issues are and can listen to the witnesses to be able to decide those issues. ________ *[However, the defense can reserve the right to make its opening statement at the beginning of the defense's presentation.]*

Following the opening statements, the plaintiff will present evidence in the form of witness testimony under oath and possibly through the introduction of exhibits.

At the conclusion of plaintiff's case, the defense is allowed to present its evidence in the same manner. Rebuttal by the plaintiff may be requested and allowed, but at the conclusion of all the testimony you are still required to keep an open mind about the case until you have heard the final instructions of law, the summation of counsel for all sides, and are sent back to the jury room to begin your deliberations.

§ 1:3 Additional introductory instructions—Civil cases

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is my duty to instruct you as to the law and it is your duty as jurors to follow these instructions. You are not to question the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base your verdict upon any other view of the law than that given you in these instructions.

You are not to single out one instruction alone as a whole. Neither the manner in which the instructions are given, nor the number of instructions on any given proposition is of any significance in determining the relative importance of such instructions.

It is the duty of the judge to be completely fair to both sides in this trial. If any instruction, ruling or statement by the Court seems to indicate to you that the Court has any opinion about the case or any particular fact, such indication would be completely false, and you must disregard it.

It is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you by the Court.

All parties in this matter have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy, or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork, or conjecture.

The evidence which you are to consider consists of the testimony of the witnesses and any exhibits admitted into evidence.

As sole judges of the facts in this case, you determine what weight will be assigned the testimony and supporting evidence and the credibility of each witness in this case. You are required to use your good common sense and sound, honest judgment in considering and weighing the testimony of each witness.

You are also permitted to draw such reasonable inferences from the evidence as seem justified in light of your own experience.

Remarks of counsel are intended to help you understand the evidence and apply the law, but they are not evidence. If any remark of counsel has no basis in evidence, then you must disregard it.

The production of evidence is governed by rules of law, and from time to time during the trial the Court may have ruled on the admissibility of evidence. You are to disregard all evidence excluded by the Court and must not concern yourself with the reasons for the Court's rulings since they are controlled by rules of law. You should not speculate as to possible answers to questions which the Court did not require be answered, and you should not draw any inference from the content of those questions.

NOTES TO FORM

Practice Notes

Charter Oak Fire Ins. Co. v. B.J. Enterprises of Mississippi, LLC, 156 So. 3d 357, 365 (Miss. Ct. App. 2014) (Jury instructions are the statements of the law governing the case, and "[i]t is the trial judge's duty to properly instruct the jury on controlling principles of Mississippi law." It appears that here, the trial court used standard jury instructions: "It is [the trial court's] duty to instruct you as to the law and it is [the jury's] duty to follow these instructions. . . . [The jury is] to apply the law to the facts and in this way decide the case.").

§ 1:4 Jury's role—Generally

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You have been selected as the jury to try this case. As jurors, you will hear the evidence and decide the disputed issues of fact, apply the law to the facts, and in this way render a verdict.

§ 1:5 Jury's role—Verdict to be based on the evidence

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy, or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture.

NOTES TO FORM

Practice Notes

Charter Oak Fire Ins. Co. v. B.J. Enterprises of Mississippi, LLC, 156 So. 3d 357, 365 (Miss. Ct. App. 2014) (Jury instructions are the statements of the law governing the case, and "[i]t is the trial judge's duty to properly instruct the jury on controlling principles of Mississippi law." It appears that here, the trial court used standard jury instructions: "It is [the trial court's] duty to instruct you as to the law and it is [the jury's] duty to follow these instructions. . . . [The jury is] to apply the law to the facts and in this way decide the case." Also, "[i]t is [the jury's] duty to determine the facts and to determine them from the evidence produced in open court.").

§ 1:6 Jury's role—How authority is to be exercised

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you by the Court.

§ 1:7 Jury's role—Wisdom of law not to be questioned

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are not to question the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base your verdict upon any view of the law other than that given you in these instructions.

§ 1:8 Jury's role—Conscientiousness

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

All parties in this matter have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

§ 1:9 Jury's role—Sympathy not to sway verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The Court instructs the jury that in passing upon the questions submitted to you for your decision, the jury must not be swayed or influenced by the natural sympathy that all persons instinctively have for one who has been injured. Sympathy should not enter into your verdict, but your verdict should be based solely upon the law and the evidence.

§ 1:10 Judge's role—Conduct of the trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is my duty to insure that the trial is conducted in a fair and orderly manner. I will rule on any objections or motions and will instruct you on the law applicable to this case and you are required to follow the law as given by the Court.

§ 1:11 Judge's role—Impartiality

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is the duty of the judge to be completely fair to both sides in this trial and if any instructions, ruling or statement by the Court seems to indicate to you that the Court has any opinion about the case or any particular fact, such indication would be completely false, and you must disregard it.

§ 1:12 Judge's role—No inference from rulings

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

During the trial, I may be required to rule on motions or objections made by the lawyers. You should not infer from my rulings or from anything I may say or do that I have any opinion on the merits of the case favoring one side or the other.

§ 1:13 Judge's role—Hearings outside the jury's presence

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It may be necessary that I conduct some of the hearings on objections or motions outside your presence. I will try to estimate the time needed for the hearing and for recesses, but frequently they last longer than we estimate because new issues arise. Your patience and understanding will contribute to a fair and orderly trial even though it may seem to go slowly.

§ 1:14 Juror contact with attorneys, parties and witnesses forbidden

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

To avoid any appearance of impropriety, I have instructed the attorneys, the parties and the witnesses not to have any contact or discussion with jurors in any way. When they appear to ignore you during a recess, they are doing this only because of my instructions. You are prohibited from having any conversation with anyone else connected with the case. You must not discuss the case with anyone during the trial, not even among yourselves. If anyone should attempt to discuss the case with you or within your hearing, you are to immediately move away and report the matter to me or the bailiff.

§ 1:15 Discussion among jurors forbidden until end of trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

During the course of the trial, you are not to discuss the case among yourselves, or discuss it with anyone else. These discussions tend to highlight certain portions of the case and prevent you from keeping an open mind throughout the trial. Also, no one else is to discuss this case in your presence. You must instruct them that you are on the jury and they may not discuss the case around you. Discussing it in your presence or attempting to influence your decision in this case would be a criminal act and you need to report any such attempt to me, the bailiff, or the clerk.

§ 1:16 Jurors may not use electronic media to discuss the case until the end of trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When you go home during the trial, do not talk to your family, friends, or others about the case. You may tell them you are a juror on a case and that is all that you should tell them. Do not discuss your experiences as a juror while the trial and deliberations are going on. Do not e-mail, blog, tweet, text or post anything to your Facebook, MySpace, Twitter, or other social networking sites about this trial. Do not visit any "chat rooms" where this case may be discussed.

NOTES TO FORM

Practice Notes

See Ind. Model Civ. Jury Inst. 101

§ 1:17 Jurors are not to conduct any research about the case

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Until you are discharged from serving on this jury, you are not to read, listen to, or watch any news reports about this case. You must not do any research on your own or as a group. You must not use dictionaries, a computer, your phone, the Internet, or use any other research materials to learn anything about this case. You are not to contact anyone, including a family doctor, accountant, or attorney, to ask *[him/her]* anything about this case. You must not visit or view the scene(s) of any event(s) involved in this case.

You must decide this case based only on the evidence presented in this trial and the instructions of law that I will give you.

§ 1:18 Instructions to be considered as a whole

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are not to single out one instruction alone as stating the law, but you must consider these instructions as a whole. Neither the manner in which the instructions are given nor the number of instructions on any given proposition is of any significance in determining the relative importance of such instructions.

§ 1:19 Terms "plaintiff" and "defendant"

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The words "plaintiff" and "defendant" apply to each plaintiff and to each defendant, respectively, except as you may be otherwise instructed.

§ 1:20 Multiple defendants—Fair and separate consideration

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Although there is more than one defendant in this suit, it does not follow from that fact alone that if one is liable ________ *[both or all]* are liable. Each defendant is entitled to a fair and separate consideration of that defendant's defense and is not to be prejudiced by your decision as to the other(s). Unless otherwise stated, the instructions apply to the case of each defendant.

Decide each defendant's case separately.

NOTES TO FORM

Practice Notes

Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner, 964 So. 2d 1138 (Miss. 2007) (trial court erred when it denied this instruction on separate consideration as the statement was neither misleading nor an incorrect statement of the law).

§ 1:21 Corporate party—Fairness

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

§ 1:22 Gender instructions—Corporations

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a corporation.

§ 1:23 Punitive damages not authorized

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You may not include as damages any amount that you might add to punish the defendant, or to make an example of him or her for the public good, or to prevent other accidents. Such damages would be punitive and they are not authorized in this action.

§ 1:24 Note taking not permitted during trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes. You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

NOTES TO FORM

Practice Notes

This instruction comes from Uniform Civil Rule of Circuit and County Court 3.14 which was adopted on April 18, 2002. The rule states that this instruction must be given if the court decides in its discretion not to allow note taking.

Coleman v. Ford Motor Co., 70 So. 3d 223, 233–34 (Miss. Ct. App. 2011) (The trial court permitted the jurors to take notes during the trial, but gave an abbreviated preliminary instruction on note-taking. However, the trial court gave the complete form instruction at the close of the evidence. Therefore, the appellate court found this alleged issue to be without merit).

Vardaman v. State, 966 So. 2d 885, 891 (Miss. Ct. App. 2007) (The trial court asked the jurors if they were interested in taking notes during trial. Six jurors responded that they would like to do so. However, the court did not give the preliminary instruction regarding note taking until after the State had begun to examine its first witness. During a break early on in the examination, the court then gave the proper instruction. The appellate court found this constituted a harmless error on the part of the trial judge).

§ 1:25 Note taking allowed during trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

NOTES TO FORM

Practice Notes

This instruction comes from Uniform Civil Rule of Circuit and County Court 3.14 which was adopted on April 18, 2002. The rule states that this instruction must be given if the court decides in its discretion to allow note taking.

Coleman v. Ford Motor Co., 70 So. 3d 223, 233–34 (Miss. Ct. App. 2011) (The trial court permitted the jurors to take notes during the trial, but gave an abbreviated preliminary instruction on note-taking. However, the trial court gave the complete form instruction at the close of the evidence. Therefore, the appellate court found this alleged issue to be without merit).

Vardaman v. State, 966 So. 2d 885, 891 (Miss. Ct. App. 2007) (The trial court asked the jurors if they were interested in taking notes during trial. Six jurors responded that they would like to do so. However, the court did not give the preliminary instruction regarding note taking until after the State had begun to examine its first witness. During a break early on in the examination, the court then gave the proper instruction. The appellate court found this constituted a harmless error on the part of the trial judge).

§ 1:26 Note taking allowed during trial—Aid to juror's memory

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.) Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors. Thus, during your deliberations, do not assume simply because something appears in your notes that it necessarily took place in court.

NOTES TO FORM

Practice Notes

This instruction comes from Uniform Civil Rule of Circuit and County Court 3.14 which was adopted on April 18, 2002. The rule states that this instruction must be given if the court decides in its discretion to allow note taking.

Coleman v. Ford Motor Co., 70 So. 3d 223, 233–34 (Miss. Ct. App. 2011) (The trial court permitted the jurors to take notes during the trial, but gave an abbreviated preliminary instruction on note-taking. However, the trial court gave the complete form instruction at the close of the evidence. Therefore, the appellate court found this alleged issue to be without merit).

Vardaman v. State, 966 So. 2d 885, 891 (Miss. Ct. App. 2007) (The trial court asked the jurors if they were interested in taking notes during trial. Six jurors responded that they would like to do so. However, the court did not give the preliminary instruction regarding note taking until after the State had begun to examine its first witness. During a break early on in the examination, the court then gave the proper instruction. The appellate court found this constituted a harmless error on the part of the trial judge).

II. BURDEN OF PROOF; EVIDENTIARY MATTERS

§ 1:27 Burden of proof—Generally

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The party who claims that certain facts exist must prove them by a preponderance of the evidence. This obligation is known as the burden of proof.

§ 1:28 Burden of proof—Plaintiff's burden

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In this case there is a claim by the plaintiff(s) and thus, the burden is upon the plaintiff(s) to prove the material elements of the claim by a preponderance of the evidence.

§ 1:29 Burden of proof—When defendant has counterclaim

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In this case, there is both a claim by the plaintiff against the defendant and a claim against the plaintiff by the defendant. Thus, the burden is upon each party to establish the material elements of his/her/its respective claims by a preponderance of the evidence.

§ 1:30 Preponderance of the evidence—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The phrase "preponderance of the evidence" means that evidence which is most consistent with the truth as measured by the experience and judgment of the jury; that which accords best with reason and probability. It does not depend upon the number of witnesses. It does depend upon the weight that you as jurors give to the witnesses' testimony and the credibility of the witnesses. It is that evidence which, after examination, has a greater persuasive and convincing power. It is that evidence which, when considered and compared with that opposed to it, has more convincing force and produces in your minds the belief that what is sought to be proved is more likely true than not true.

NOTES TO FORM

Practice Notes

The plaintiff has the duty in a tort case to prove by a preponderance of the evidence, e.g., with reasonable definiteness, that the party charged with the tort is the one actually responsible for it. The plaintiff must show with fair or reasonable certainty or definiteness that the party charged is the party actually responsible for the wrong. It is not enough that this shall be left to conjecture or to inferences so loose as that it cannot be dependably told where conjecture ceases and cogent inferences begin. Rucker v. Hopkins, 499 So. 2d 766, 769 (Miss. 1986) (citations omitted).

As in any civil action, the trier of facts may act on circumstantial as well as direct evidence, and, in the end, confronts the question, whether the evidence preponderates in the plaintiff's favor, that is, produces rational belief that the factual predicates of the plaintiff's claims are more likely true than not. Hickman v. State ex rel. Mississippi Dept. of Public Safety, 592 So. 2d 44, 46 (Miss. 1991) (citations omitted).

§ 1:31 Clear and convincing evidence—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.

NOTES TO FORM

Practice Notes

Hospital Housekeeping Systems, Inc. v. Townsend, 993 So. 2d 418, 426–27 (Miss. Ct. App. 2008) (quoting Moran v. Fairley, 919 So. 2d 969, 975 (Miss. Ct. App. 2005)).

As a matter of common sense, clear and convincing evidence is a standard of persuasion higher than the ordinary preponderance standard. McClendon v. State, 539 So. 2d 1375, 1378 (Miss. 1989).

§ 1:32 Direct and circumstantial evidence—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Ladies and Gentlemen of the jury, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

The court instructs the jury that "direct evidence" is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did. "Direct evidence" is the testimony of someone who claims to have actual knowledge of a fact or who claims to have personal knowledge of the commission of the crime which has been charged. "Direct evidence" is simply evidence which, if you believe it, directly proves a fact. An example is if a witness testified that he or she saw it raining outside, and you believed him or her, that would be direct evidence that it was raining.

The court instructs you that "circumstantial evidence" is proof of a fact or facts from which you could conclude, by your reason and common sense, that another fact exists, even though it has not been proven directly. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. "Circumstantial evidence" is simply a chain of circumstances that indirectly proves a fact. An example is if someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

The law makes no distinction between the weight to be given either direct or circumstantial evidence. You, as the jury, should decide how much weight to give to any evidence.

NOTES TO FORM

Practice Notes

This instruction may be helpful to the jury to understand the difference between circumstantial and direct evidence. Both types of evidence are entitled to the same amount of weight. Sherrell v. State, 622 So. 2d 1233 (Miss. 1993); Guilbeau v. State, 502 So. 2d 639 (Miss. 1987).

Research References

Trial Strategy

First Circuit Pattern Jury Instructions, Criminal Cases, Instruction No. 3.05 (1998)

Sixth Circuit Pattern Jury Instructions, Criminal Cases, Instruction No. 1.06 (1991)

Ninth Circuit Model Jury Instructions, Civil Cases, Instruction No. 1.05 (1997)

§ 1:33 Rulings on admissibility of evidence

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The production of evidence is governed by rules of law, and from time to time during the trial the Court may have ruled on the admissibility of evidence. You are to disregard all evidence excluded by the Court and must not concern yourself with the reasons for the Court's rulings since they are controlled by rules of law. You should not speculate about possible answers to questions which the Court did not require be answered, and you should not draw any inference from the content of those questions.

§ 1:34 Requests for admissions—Use in trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In this case the ________ *[plaintiff or defendant]* served on the ________ *[defendant or plaintiff]* a written request to admit the truth of certain facts. You must regard as being conclusively proved all facts which were expressly admitted by the ________ *[defendant or plaintiff]* or which ________ *[defendant or plaintiff]* failed to deny.

§ 1:35 Depositions—Use in trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

During the trial of the case certain testimony has been read to you from a deposition. The testimony of a witness, who for some reason cannot be here in person to testify from the witness stand, is usually presented in writing under oath in the form of a deposition. Such testimony is entitled to the same consideration, and, so far as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present and testified from the witness stand.

§ 1:36 Interrogatories—Use in trial

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An interrogatory is a written question one party asks another who must answer it under oath in writing. You must consider interrogatories and the answers thereto just as if the questions had been asked and answered here in court.

§ 1:37 Stipulated witness testimony

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The attorneys have stipulated that if ______ were called as a witness, *[he/she]* would testify as stipulated. You must consider that stipulated testimony as if it had been given here in court.

§ 1:38 Weight and credibility of the evidence

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

As sole judges of the facts in this case, you determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case. You are required to use your good common sense and sound, honest judgment in considering and weighing the testimony of each witness.

NOTES TO FORM

Practice Notes

In re Extension, Enlarging of Boundaries of City of Laurel, 922 So. 2d 791, 795–96 (Miss. 2006) (favorably citing this instruction concerning the role of a juror and applying it to a chancellor sitting as the trier of fact); Austin v. State, 784 So. 2d 186, 193 (Miss. 2001) (approving trial court giving this general instruction).

§ 1:39 Credibility of witnesses

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Each person testifying under oath is a witness. You have the duty to determine the believability of the witnesses. In performing this duty you are the sole judges of the credibility of the witnesses and the weight and worth of their testimony. You may consider the interest any witness may have in the case, his or her relationship with the parties in the case, and his or her demeanor on the witness stand. You may also consider in judging the credibility of witnesses, their opportunity for knowing and seeing the facts and conditions about which they testified, their candor, fairness and intelligence, and the extent to which the witnesses have been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

§ 1:40 Discrepancies in witness testimony

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Discrepancies in a witness' testimony or between his or her testimony and that of others ________ *[if there were any]*, do not necessarily mean that the witness should be discredited. Failure of recollection is common. Innocent misrecollection occurs. Two persons witnessing an incident or a transaction often will see or hear it differently. You should also consider whether a discrepancy pertains to an important matter or only to something trivial.

§ 1:41 Expert witnesses

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The rules of evidence provide that where scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify and state his or her opinion concerning such matters. You will recall that several individuals have testified as experts in this case either in person or by deposition. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

§ 1:42 Spoliation of Evidence

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When evidence is lost or destroyed by one party, thus hindering the other party's ability to prove his/her/its case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss.

NOTES TO FORM

Practice Notes

Thomas v. Isle of Capri Casino, 781 So. 2d 125, 133 (Miss. 2001) (When evidence is lost or destroyed by one party (the "spoliator"), thus hindering the other party's ability to prove his case, a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss. . . . Because the presumption of unfavorability is not solely confined to the specific issue of what information was contained in the missing evidence, the fact finder is free to draw a general negative inference from the act of spoliation, regardless of what the spoliator's rebuttal evidence shows.).

Dowdle Butane Gas Co., Inc. v. Moore, 831 So. 2d 1124, 1127 (Miss. 2002) (In Mississippi, as in the majority of jurisdictions, proof of spoliation gives rise to a "spoliation inference," recognized by this Court as early as 1878 in Bott v. Wood, 56 Miss. 136, 1878 WL 7352 (1878). The inference entitles the nonoffending party to an instruction that the jury may infer that spoliated evidence is unfavorable to the offending party.).

III. DELIBERATIONS

§ 1:43 Jury deliberations—Sworn duty

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The verdict of the jury must represent the considered judgment of each juror. It is your sworn duty as jurors to consult with one another and to deliberate to reach an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but must do so only after you impartially consider the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you become convinced it is wrong. However, do not surrender your honest convictions about the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

§ 1:44 Jury deliberations—Duty

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate to reach an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but must do so only after you impartially consider the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you become convinced it is wrong. However, do not surrender your honest convictions about the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

§ 1:45 Nine-person verdict

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is not necessary that all twelve (12) of you agree upon a verdict in this case. When any nine (9) or more of your members have agreed upon a verdict, it may be returned in the court as the verdict of the entire jury.

NOTES TO FORM

Practice Notes

Mississippi Rule of Civil Procedure 48(a).

§ 1:46 Five-person verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is not necessary that all six (6) of you agree upon a verdict in this case. When any five (5) or more of your members have agreed upon a verdict, it may be returned in the court as the verdict of the entire jury.

NOTES TO FORM

Practice Notes

Mississippi Rule of Civil Procedure 48(b).
This instruction is for use in county court.

§ 1:47 Jury deliberations—Forbidden actions

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The law forbids you to decide any issue in this case by the flip of a coin, the drawing of lots or by any other chance determination. For example, if you determine that a party is entitled to recover, you must not decide the amount of damages to be awarded ________ *[or any percentage of negligence]* by averaging the amounts you arrive at individually and making your verdict, without further exercise of your independent consideration, judgment and decision.

§ 1:48 Juror's conduct at beginning of deliberations

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The attitude and conduct of jurors at the beginning of your deliberations are very important. It is rarely helpful for a juror, on entering the jury room, to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter. You must be impartial judges of the facts.

§ 1:49 Manner of deliberations—Selection of a foreman

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

I do not tell you how you are to deliberate. That decision is left to you. You may select a foreman, who can be any one of your number, but you are not required to have a foreman. You may have a secret ballot, or simply a show of hands. However, when *[five / nine]* or more of you have reached a verdict, you will need to write that verdict on a separate sheet of paper, make the bailiff aware that you have reached a verdict, and return it into open court as the verdict of the jury.

§ 1:50 Deliberations in bifurcated trial—Liability issue

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You will now retire and select one of your number to act as foreman who will preside over your deliberation.

You will return a verdict only on the issue of liability without reference to damages.

As soon as *[five / nine]* or more of you have agreed upon a verdict on the issue of liability, you will have the foreman sign and date it and then will return with it to this room.

§ 1:51 Deliberations in bifurcated trial—Damage issue

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You have already returned your verdict on the issue of liability in favor of the plaintiff(s) against the defendant(s). Now, you shall retire and deliberate on the issue of damages.

The same foreman may preside over your deliberations or you may elect a new foreman.

Your deliberations on the issue of damages will be governed by the instructions already given to you so far as they are applicable, as well as by the instructions on damages.

As soon as *[five / nine]* or more jurors have agreed upon a verdict on the issue of damages, have it signed and dated by your foreman and then return with it to this room.

§ 1:52 Communicating with the court

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. During deliberations, no member of the jury should ever attempt to communicate with the Court by any means other than in writing. And the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or orally here in open Court.

§ 1:53 Instruction for deadlocked jury

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	}	
v.	}	Case No. *[case number]*
[Name of defendant], Defendant.	}	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

I know that it is possible for honest men and women to have honest, differing opinions about the facts of a case, but if it is possible to reconcile your differences of opinion and decide this case, then you should do so. Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations.

NOTES TO FORM

Practice Notes

The Mississippi Supreme Court officially approved this instruction for a deadlocked jury in Sharplin v. State, 330 So. 2d 591 (Miss. 1976).

IV. VERDICT FORMS

§ 1:54 Form of the verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When you reach a verdict in this case, you should write it on a separate piece of paper. You need not sign it, and it may be in either of the following forms:

If you find for the plaintiff:

"We, the jury, find for the plaintiff and assess his/her/its damages at $________."

If you find for the defendant:

"We, the jury, find for the defendant."

NOTES TO FORM

Research References

West's Key Number Digest
Trial ⚷217, 228(1)

Legal Encyclopedias
C.J.S., Trial §§ 298, 320, 322, 326, 329, 333

§ 1:55 Form of the verdict—One or more defendants

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When you reach a verdict in this case, you should write it on a separate sheet of paper and you need not sign it.

If you find for the plaintiff(s) against one or more of the defendants, your verdict should be in the following form:

"We, the jury, find for the plaintiff(s) and against ________ *[name the defendant or defendants]* and assess ________ *[his/her/its or their]* damage at $________."

If you find for the plaintiff(s) and against more than one or against ________ *[all or both]* of the defendants, you should fix one amount as damages payable by all of the defendants that you find liable. You cannot return a verdict against one defendant for a certain amount and against another defendant for a different amount. The amount of damages which you award, if any, are not apportioned by you between defendants that you find to be jointly liable.

If you find for ________ *[all or both]* of the defendants, your verdict should be in the following form:

"We, the jury, find for ________ *[name the defendant or defendants]*."

Should your verdict be for the plaintiff against one or more of the defendants and in favor of another defendant or defendants, then both forms should be used.

§ 1:56 Form of the verdict—Actual and punitive damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When you reach a verdict in this case, you should write it on a separate piece of paper, it need not be signed by you, and may be in one of the following forms:

If you find for the plaintiff: "We, the jury, find for the plaintiff and assess his/her/its actual damages at $________."

If you find for the plaintiff:

"We, the jury, find for the plaintiff and assess his/her/its actual damages at $________ and his/her/its punitive damages at $________."

If you find for the defendant:

"We, the jury, find for the defendant."

NOTES TO FORM

Practice Notes

Other Verdict forms and Special Verdict forms are located in Chapter 10—Damages, §§ 10:1 et seq.; Chapter 13—Professional Malpractice, §§ 13:1 et seq.; Chapter 16—Products Liability, §§ 16:1 et seq.; and Chapter 19—Will Contests, §§ 19:1 et seq.

Research References

West's Key Number Digest

Damages ⚷215

Chapter 2

Abuse of Process

§ 2:1 Abuse of Process—Definition
§ 2:2 —Causation—Damages
§ 2:3 —Elements
§ 2:4 —General instruction
§ 2:5 — —Willful act

Research References

West's Key Number Digest

Damages 🔑1 to 7

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 2:1 Abuse of Process—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An abuse of process is the misuse of the power of the court. It is an act done in the name of the court and under its authority, by means of use of a legal process not proper in the conduct of a proceeding, for the purpose of perpetrating an injustice.

NOTES TO FORM

Practice Notes

See 1 Am. Jur. 2d, Abuse of Process §§ 1, 5.

§ 2:2 Abuse of Process—Causation—Damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A plaintiff who has suffered damage, loss or harm as a ________ *[proximate or legal]* result of abuse of a legal process by a defendant is entitled to recover damages from that defendant for such harm.

NOTES TO FORM

Practice Notes

See 1 Am. Jur. 2d, Abuse of Process § 7.

§ 2:3 Abuse of Process—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An abuse of process claim requires that the plaintiff must prove that (1) the defendant made an illegal use of a legal process; (2) the defendant had an ulterior motive; and (3) damage resulted from the perverted use of process.

NOTES TO FORM

Practice Notes

Hudson v. Palmer, 977 So. 2d 369, 381 (Miss. Ct. App. 2007) (An abuse of process claim requires the plaintiff show (1) the defendant made an illegal use of a legal process, (2) the defendant had an ulterior motive, and (3) damage resulted from the perverted use of process).

Ayles ex rel. Allen v. Allen, 907 So. 2d 300, 303 (Miss. 2005) (This court has defined abuse of process as follows: The action of abuse of process consists in the misuse or misapplication of a legal process to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a regularly issued civil or criminal process, for a purpose and to obtain a result not lawfully warranted or properly attainable thereby, and for which perversion an action will lie to recover the pecuniary loss sustained. Thus, the three elements of abuse of process are: (1) the party made an illegal use of a legal process, (2) the party had an ulterior motive, and (3) damage resulted from the perverted use of process. This court has stated that the crucial element of this tort is the intent to abuse the privileges of the legal system).

§ 2:4 Abuse of Process—General instruction

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. The defendant made an illegal use of a legal process;
2. The defendant had an ulterior motive; and
3. Damage resulted from the perverted use of process,

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Hudson v. Palmer, 977 So. 2d 369, 381 (Miss. Ct. App. 2007) (An abuse of process claim requires the plaintiff show (1) the defendant made an illegal use of a legal process, (2) the defendant had an ulterior motive, and (3) damage resulted from the perverted use of process).

Ayles ex rel. Allen v. Allen, 907 So. 2d 300, 303 (Miss. 2005) (This court has defined abuse of process as follows: The action of abuse of process consists in the misuse or misapplication of a legal process to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a regularly issued civil or criminal process, for a purpose and to obtain a result not lawfully warranted or properly attainable thereby, and for which perversion an action will lie to recover the pecuniary loss sustained. Thus, the three elements of abuse of process are: (1) the party made an illegal use of a legal process, (2) the party had an ulterior motive, and (3) damage resulted from the perverted use of process. This court has stated that the crucial element of this tort is the intent to abuse the privileges of the legal system).

§ 2:5 Abuse of Process—General instruction—Willful act

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order to return a verdict for damages in an action for abuse of process, the plaintiff must establish each of the following elements by a preponderance of the evidence:

1. That the defendant used a legal process in a wrongful manner, not proper in the regular conduct of a proceeding, to accomplish a purpose for which it was not designed;
2. That the defendant acted with an ulterior motive;
3. That defendant committed a willful act or threat, not authorized by the process and not proper in the regular conduct of the proceedings;
4. That the plaintiff suffered damage, loss or harm; and

5. That such damage, loss or harm was the proximate result of such use of the legal process.

However, if you believe that the plaintiff has failed to show any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant on the claim of abuse of process.

NOTES TO FORM

Practice Notes

Grosch v. Tunica County, Miss., 2009 WL 161856 (N.D. Miss. 2009) **(unpublished opinion)**.

Chapter 3

Accord and Satisfaction

Research References

West's Key Number Digest

Accord and Satisfaction 🔑1 to 27

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 3:1 General instruction

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

To constitute an accord and satisfaction, four basic conditions must be met. They are:

(1) Something of value is offered in full satisfaction of an obligation;

(2) The thing of value offered is accompanied by acts and declarations which amount to a condition that, if the thing offered is accepted, it is accepted in satisfaction of the obligation;

(3) The party to whom the thing of value is offered understands that, if *[he/she]* takes it, *[he/she]* takes it subject to such conditions; and

(4) The party does actually accept the thing of value.

NOTES TO FORM

Practice Notes

United American Ins. Co. v. Merrill, 978 So. 2d 613, 625 (Miss. 2007) (The elements of accord and satisfaction are (1) something of value offered in full satisfaction of a demand; (2) accompanied by acts and declarations as amount to a condition that if the thing offered is accepted, it is accepted in satisfaction; (3) the party offered the thing of value is bound to understand that if he takes it, he takes subject to such conditions; and (4) the party actually does accept the item).

Chapter 4

Agency

§ 4:1 Definition of agent and principal
§ 4:2 General liability
§ 4:3 Express, implied and apparent authority
§ 4:4 Scope of agent's authority
§ 4:5 Explanation of scope of authority
§ 4:6 Deviations from instructions
§ 4:7 Deviations from authority
§ 4:8 Departure from scope for personal activity
§ 4:9 Ratification by acts of principal
§ 4:10 Principal estopped to deny authority
§ 4:11 Principal's liability for agent's operation of motor vehicle
§ 4:12 —Presumptions and burden of proof
§ 4:13 Definition of independent contractor
§ 4:14 Rule of liability for independent contractors
§ 4:15 Definition of joint adventure
§ 4:16 Tort liability for joint adventure—Automobiles

Research References

West's Key Number Digest

Principle and Agent 🔑1 to 199

Legal Encyclopedias

Am. Jur. 2d, Agency §§ 1 to 354

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
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§ 4:1 Definition of agent and principal

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

One is the agent of another person called a "principal" at a given time if *[he/she]* is authorized to act for or in place of such person. ________ *[One may be an agent although [he/she] receives no payment for his/her services.]* For the purposes of this trial, the term "agent" includes servants and employees, and the term "principal" includes employers.

NOTES TO FORM

Practice Notes

See State v. Brooks, 781 So. 2d 929, 933–34 (Miss. Ct. App. 2001) ("Agent" is defined as follows: A person authorized by another (principal) to act for or in place of him).

The bracketed sentence should be used only in cases in which there was no payment for the services.

§ 4:2 General liability

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case:

(1) That ________ *[name]* was the ________ *[agent or employee]* of his/her ________ *[principal or employer]*;

(2) That ________ *[name]* was acting in the scope of his/her employment at the time of the accident in question;

(3) That ________ *[name]* was negligent; and

(4) That such negligence was the sole proximate cause or a proximate contributing cause of the plaintiff's injury, if any, then the ________ *[principal or employer]* and the ________ *[agent or employee]* are jointly and severally liable to the plaintiff.

NOTES TO FORM

Practice Notes

See 3 Am. Jur. 2d, Agency § 1 and 27; Employment Relationship § 373. Mississippi Civil Jury Instructions §§ 4:1, 14:1, and 14:2 should be used with this instruction.

Research References

West's Key Number Digest

Principal and Agent ⚷191

Legal Encyclopedias

C.J.S., Agency § 553

§ 4:3 Express, implied and apparent authority

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. — Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Express authority is that authority given the ________ *[agent or employee]* by words, oral or written, or by conduct of the ________ *[principal or employer]*, to do the work for which the ________ *[agent or employee]* is hired or engaged.

Implied authority is that authority necessary or incidental to carry out the work for which the ________ *[agent or employee]* is hired or engaged.

Apparent authority of an ________ *[agent or employee]* is that authority which a reasonably prudent person, familiar with the usage of the particular business, would think such an ______ *[agent or employee]* would have. If a ______ *[principal or employer]* by words or conduct permits such appearance of authority in an ______ *[agent or employee]*, *[he/she]* is responsible for any resulting injury to another, provided the injured person acted reasonably in relying on such appearance of authority and did not know, or have reason to know, the true facts of the agent's authority.

NOTES TO FORM

Practice Notes

Mississippi Civil Jury Instruction § 4:1 should be used with this instruction. This instruction should be expanded, when read to a jury, to include a recitation of the factual circumstances of the case in which it is granted.

Butler v. Bunge Corp., 329 F. Supp. 47 (N.D. Miss. 1971); McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969); Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955); Tarver v. J.W. Sanders Cotton Mill, 187 Miss. 111, 192 So. 17 (1939).

Research References

West's Key Number Digest

Principal and Agent ⚷191(2)

Legal Encyclopedias

Am. Jur. 2d, Agency § 18
C.J.S., Agency § 553

Model Codes and Restatements

Restatement Second, Agency § 7 Comment c
Restatement Second, Agency § 8 Comment a

Additional References

W. Seavey, Law of Agency § 8d (1964)

§ 4:4 Scope of agent's authority

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An ________ *[agent or employee]* is acting within the scope of his/her ________ *[authority or employment]* when *[he/she]* is performing services or work for which *[he/she]* has been hired or engaged, or when *[he/she]* is doing something reasonably incidental to such work. The question is not necessarily whether such conduct was expressly authorized or forbidden, but rather whether it could have been fairly foreseen from the nature of his/her work and the duties relating to it, and whether *[he/she]* acted, at least in part, in an effort to serve his/her employer.

NOTES TO FORM

Practice Notes

This is a general instruction and must be supplemented with explanatory instructions covering the work for which the agent was hired or engaged and that which occupied him or her at the time of the incident in question.

Sears, Roebuck & Co. v. Creekmore, 199 Miss. 48, 23 So. 2d 250 (1945); Jefferson v. Yazoo & M. V. R. R. Co., 194 Miss. 729, 11 So. 2d 442 (1943); Loper v. Yazoo & M.V.R. Co., 166 Miss. 79, 145 So. 743 (1933); Alden Mills v. Pendergraft, 149 Miss. 595, 115 So. 713 (1928).

Research References

West's Key Number Digest

Principal and Agent ⚷191(2)

Legal Encyclopedias

C.J.S., Agency § 553

Model Codes and Restatements

Restatement Second, Agency §§ 228, 229, 230

§ 4:5 Explanation of scope of authority

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

It is not necessary that the principal expressly authorize that the conduct of the agent be undertaken for the benefit of the principal for such conduct to be within the scope of the agent's ________ *[authority or employment]*. Conduct which is incidental to, customarily connected with, or reasonably necessary for the performance of an authorized act is within the scope of the agent's ______ *[authority or employment].*

NOTES TO FORM

Practice Notes

3 Am. Jur. 2d, Agency § 16.

§ 4:6 Deviations from instructions

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A principal is responsible for the acts of his/her agent done within the scope of his/her employment and within the line of his/her duties, even though such acts are contrary to the principal's express instructions ______ *[unless the person dealing with the agent had notice of the instructions].*

NOTES TO FORM

Practice Notes

Bracketed portion may be given only when supported by evidence.

Jenkins v. Cogan, 238 Miss. 543, 119 So. 2d 363 (1960); Lovett Motor Co. v. Walley, 217 Miss. 384, 64 So. 2d 370 (1953); Loper v. Yazoo & M.V.R. Co., 166 Miss. 79, 145 So. 743 (1933); Walters v. Stonewall Cotton Mills, 136 Miss. 361, 101 So. 495 (1924); Odd Fellows' Benefit Ass'n v. Smith, 101 Miss. 332, 58 So. 100 (1912).

Research References

West's Key Number Digest

Principal and Agent 🔑191(2)

Legal Encyclopedias

Am. Jur. 2d, Agency § 263
C.J.S., Agency §§ 95, 553

Model Codes and Restatements

Restatement Second, Agency §§ 160, 161

Additional References

W. Prosser, The Law of Torts § (1971)

§ 4:7 Deviations from authority

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A ________ *[principal or employer]* is not responsible for the acts of his/her ________ *[agent or employee]* which exceed the scope of the agent's express, implied or apparent authority ________ *[unless ________ (principal or employer) ratifies the acts or is estopped from raising the defense of the ________ (agent's or employee's) lack of authority]*.

NOTES TO FORM

Practice Notes

This instruction should always be accompanied by instructions explaining "apparent authority" (§ 4:3). Either option may be included if ratification by the principal or estoppel is raised in support of the existence of the agency. If either option is included in the instruction, instructions defining ratification by principal (§ 4:9) or estoppel (§ 4:10) should be given. A distinction should be made between those situations and deviations from instructions. See notes accompanying § 4:6.

Cue Oil Co. v. Fornea Oil Co., 208 Miss. 810, 45 So. 2d 597 (1950); Aetna Ins. Co. v. Singleton, 174 Miss. 556, 164 So. 13 (1935); Ismert-Hincke Milling Co. v. Natchez Baking Co., 124 Miss. 205, 86 So. 588 (1920); Odd Fellows' Benefit Ass'n v. Smith, 101 Miss. 332, 58 So. 100 (1912); Johnson v. Blasdale, 9 Miss. 17, 1 S. & M. 17, 1843 WL 3242 (1843).

Research References

West's Key Number Digest
Principal and Agent ⚷194(2)

Legal Encyclopedias
C.J.S., Agency § 553

§ 4:8 Departure from scope for personal activity

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A ________ *[principal or employer]* is not liable to others for the intentional or negligent acts of his/her ________ *[agent or employee]* where there is an abandonment of the ________ *[principal's or employer's]* business for personal missions of the ________ *[agent or employee]*. The agency is suspended during the time of his/her abandonment from the principal's business.

If you find from a preponderance of the evidence in this case that ________ *[agent's name]* had abandoned the defendant's business for a personal mission when *[he/she]* caused the plaintiff's injuries, then your verdict shall be for the defendant ________ *[principal]*.

NOTES TO FORM

Practice Notes

To be used in cases where principal claims the agent had departed from the line and scope of his employment to engage in personal activity.

International Shoe Co. v. Harrison, 217 Miss. 152, 63 So. 2d 837 (1953); Lovett Motor Co. v. Walley, 217 Miss. 384, 64 So. 2d 370 (1953); Kramer Service v. Robinson, 201 Miss. 805, 29 So. 2d 456 (1947).

Research References

West's Key Number Digest
Principal and Agent ⚷191(2)

Legal Encyclopedias
C.J.S., Agency § 553

§ 4:9 Ratification by acts of principal

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A ________ *[principal or employer]* is responsible for the act(s) of his/her ________ *[agent or employee]* committed beyond the scope of the agent's authority, where the principal ratifies such act. Ratification by the principal of an act of his/her agent requires an intent on the part of the principal to ratify such an act. This intention exists when the principal, with adequate knowledge of the facts and circumstances, expresses his/her intent or so conducts himself/herself as to indicate his/her purpose to confirm or adopt the unauthorized act of his/her agent.

If you find, from the preponderance of the evidence that:

1. The defendant, ________, had knowledge of ________ *[state facts and circumstances constituting the agent's unauthorized act]*;
2. The defendant, by ________ *[describe defendant's words / acts]* expressed his/her intent or so conducted himself/herself as to indicate his/her purpose to confirm or adopt the unauthorized act of ________ *[agent]*;

then *[he / she]* is responsible for the agent's act.

NOTES TO FORM

Practice Notes

Use this instruction in conjunction with Mississippi Civil Jury Instruction § 4:8 dealing with departure from scope for personal activity.

To be used where it is claimed an unauthorized act of an agent was subsequently ratified.

Ratification differs from estoppel in that the former rests on intention, express or implied, regardless of prejudice to another, whereas estoppel rests on prejudice rather than intention. See 3 Am. Jur. 2d, Agency §§ 184 et seq.

A principal can be found to have ratified his agent's acts only if he had full and complete knowledge of all material facts relating to the act. It is not enough to have information which, if pursued, would lead to full and complete knowledge of these facts. Gulf Refining Co. v. Travis, 201 Miss. 336, 30 So. 2d 398 (1947).

Upon acquiring full and complete knowledge, the principal must so conduct himself as to evince an intent to approve his agent's acts. Ordinarily, mere silence is not enough to show a ratification. Wellford & Withers v. Arnold, 162 Miss. 786, 140 So. 220 (1932).

This is not a complete instruction. It must be used in conjunction with a general liability instruction.

Gulf Refining Co. v. Travis, 201 Miss. 336, 30 So. 2d 398 (1947); Taylor v. Connor, 41 Miss. 722, 1868 WL 3365 (1868).

Research References

West's Key Number Digest

Principal and Agent ⚷191(3)

Legal Encyclopedias
C.J.S., Agency § 553

§ 4:10 Principal estopped to deny authority

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A ________ *[principal or employer]* is responsible for an act of his/her ________ *[agent or employee]* which was committed beyond the scope of the agent's authority, where the ________ *[action or inaction]* of the principal justifies the belief by a person of reasonable prudence ordinarily familiar with business practices that the agent had authority to perform that particular act, and such person had ________ *[acted or not acted]* to his/her prejudice or detriment in reliance on his/her belief of the agent's authority.

NOTES TO FORM

Practice Notes

McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969); Union Compress & Warehouse Co. v. Mabus, 217 So. 2d 23 (Miss. 1968); Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955).

Research References

West's Key Number Digest
Principal and Agent ⚷191(1)

Legal Encyclopedias
C.J.S., Agency § 553

Model Codes and Restatements
Restatement Second, Agency § 8b

§ 4:11 Principal's liability for agent's operation of motor vehicle

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If an agent is acting within the scope of his/her ________ *[employment or authority]* while operating a motor vehicle ________ *[owned or provided]* by his/her principal, the principal is liable for the ________ *[wrongful acts of or injuries caused by]* the agent while operating the motor vehicle.

NOTES TO FORM

Practice Notes

To be used when an agent is using a vehicle provided by his/her principal and there is evidence that the agent was acting within the scope of his/her authority. This instruction, when given, should be preceded by § 4:5.

Mississippi Power & Light Co. v. Laney, 247 Miss. 71, 154 So. 2d 128 (1963); Primos v. Gulfport Laundry & Cleaning Co., 157 Miss. 770, 128 So. 507 (1930).

Research References

West's Key Number Digest

Automobiles ⚷246(16), 246(17)

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 531, 552

Model Codes and Restatements

Restatement Second, Agency § 238

§ 4:12 Principal's liability for agent's operation of motor vehicle—Presumptions and burden of proof

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

One of the issues which must be resolved by the jury is whether ________ *[name of employee or servant]* was acting within the scope of his/her employment by ________ *[name of principal or master]* at the time of accident. In this connection the law permits the jury to find from a preponderance of the evidence that ________ *[name of employee or servant]* was acting within the scope of his/her employment from the mere fact that ________ *[name of principal or master]* was the owner of the vehicle involved in the accident. However, if you find from a preponderance of the evidence that, at the time of the accident, ________ *[name of employee or servant]* was using ________ *[name of defendant, principal, or master]*'s vehicle for a personal purpose outside the scope of his/her employment, then your verdict should be for the defendant ________ *[name of defendant, master or principal]*.

NOTES TO FORM

Practice Notes

Jack Cole Co. v. Hudson, 409 F.2d 188 (5th Cir. 1969); Riverside Industries of Philadelphia v. Watkins, 195 So. 2d 844 (Miss. 1967).

See Mississippi Civil Jury Instruction § 4:8.

Research References

West's Key Number Digest

Automobiles 🔑246(16), 246(17)

A.L.R. Library

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 A.L.R.2d 196

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 531, 552

§ 4:13 Definition of independent contractor

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An independent contractor is one who agrees to perform a service for a principal, but whose physical conduct in the performance of the service is not subject to the right of control by the principal.

NOTES TO FORM

Practice Notes

This instruction is intended for tort cases only. The term "principal" is synonymous with the term "master." Restatement Second, Agency §§ 1, 2, 219, 220, uses the terms "principal and agent" and "master and servant" in a strict technical sense to distinguish agents in general from those agents for whose acts vicarious responsibility will lie. The committee deemed the distinction too technical for instruction purposes and defined "principal and agent" in terms formerly confined to the "master-servant" relationship.

Miss. Code Ann. § 71-3-3(r).

Southern Natural Gas Co. v. Wilson, 304 F.2d 253 (5th Cir. 1962); Brown v. L. A. Penn and Son, 227 So. 2d 470 (Miss. 1969); Lancaster v. Lancaster, 213 Miss. 536, 57 So. 2d 302 (1952); Carr v. Crabtree, 212 Miss. 656, 55 So. 2d 408 (1951); McDonald v. Hall-Neely Lumber Co., 165 Miss. 143, 147 So. 315 (1933).

Research References

West's Key Number Digest

Master and Servant ⚷316(1) et seq., 332(4)

Legal Encyclopedias

C.J.S., Agency § 474

Treatises and Practice Aids

Minn. Jury Instruction Guides, JIG II, 250 G-S (1974)

Model Codes and Restatements

Restatement Second, Agency § 2 (3)

§ 4:14 Rule of liability for independent contractors

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that ________ *[claimed independent contractor]* agreed to perform ________ *[describe work]* for the defendant, ________, but that the physical conduct of ________ *[claimed independent contractor]* in the performance of this work was not subject to the right of control by the defendant, then you shall find for the defendant.

NOTES TO FORM

Practice Notes

This is an affirmative defense instruction.

Brown v. E. L. Bruce Co., 253 Miss. 1, 175 So. 2d 151 (1965); Kisner v. Jackson, 159 Miss. 424, 132 So. 90 (1931); Caver v. Eggerton, 157 Miss. 88, 127 So. 727 (1930).

Research References

West's Key Number Digest

Master and Servant 🔑316(1) et seq., 332(4)

Legal Encyclopedias

C.J.S., Agency § 553

Treatises and Practice Aids

Minn. Jury Instruction Guides, JIG II, 251 S. (1974)

§ 4:15 Definition of joint adventure

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A joint adventure exists when two or more persons combine in a single business enterprise, expressed or implied, for their mutual benefit, with the understanding that each is to share in its profits or losses, and that each is to have a voice in its control and management.

NOTES TO FORM

Practice Notes

Evans v. Davis, 401 So. 2d 1096, 1098 (Miss. 1981) (While perhaps no exact definition of a joint adventure can be given, nor can a general rule be laid down by which the question as to what amounts to a joint adventure can be answered, the answer in each case depending on the terms of the agreement, the acts of the parties, the nature of the undertaking and other facts, some definitions have been attempted. In 30 Am. Jur., Sec. 3, it is said: "A joint adventure has been broadly defined as an enterprise undertaken by several persons jointly, and, more particularly, as an association of two or more persons to carry out a single business enterprise for profit . . . for which purpose they combine their property, money, effects, skill and knowledge." In Simpson v. Richmond Worsted Spinning Co., 128 Me. 22, 145 A. 250, 253 (1929), the Court said a "joint adventure" has been defined as "an association of two or more persons to carry out a single business enterprise for profit. . ." A federal court said: "Joint adventure exists when two or more persons combine in joint business enterprise for their mutual benefit with understanding that they are to share in profits or losses and that each is to have voice in its management.") (citations omitted).

See Sample v. Romine, 193 Miss. 706, 8 So. 2d 257, corrected, 193 Miss. 706, 10 So. 2d 346 (1942).

Research References

West's Key Number Digest

Automobiles ⚷1.1, 8

Legal Encyclopedias

Am. Jur. 2d, Joint Ventures §§ 1, 4, 41 to 44
C.J.S., Joint Adventures §§ 1, 16

§ 4:16 Tort liability for joint adventure—Automobiles

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The principle of joint adventure in the operation of a motor vehicle makes each of two or more persons responsible for the negligence of the other(s) because the occupants are mutual agents and principals in the operation of the motor vehicle. The business they are on or which they intend to do after the journey must involve such a community of interest and obligation as to make the trip itself an integral part of such a venture.

Thus, if you find from a preponderence of the evidence in this case that ________ *[defendant A]* and ________ *[defendant B]* each had a right to a voice in the operation and control of the vehicle and were traveling to ________ *[here describe common business done on or after the journey]* then ________ *[defendant A]* and ________ *[defendant B]* were engaged in a joint adventure and both are responsible for the negligence, if any, of the other.

However, occupants of an automobile on a pleasure trip are not engaged in a joint adventure. Thus, the driver of the automobile is not the agent of all, so that all are not responsible for any negligence.

NOTES TO FORM

Practice Notes

Mississippi Civil Jury Instruction § 4:1 should be given with this instruction.

Buford v. Horne, 300 So. 2d 913 (Miss. 1974).

Research References

West's Key Number Digest
Automobiles ⚷216, 217

Legal Encyclopedias
C.J.S., Motor Vehicles § 531

Chapter 5

Animals

§ 5:1 General instructions—Wild animals
§ 5:2 General instruction—Domestic animals
§ 5:3 —Domesticated animals
§ 5:4 Standard of care—Owners or keepers of abnormally dangerous domestic animals
§ 5:5 Liability of owners or keepers for animals roaming at large—Highways
§ 5:6 Liability of owners or keepers for livestock roaming onto lands of another
§ 5:7 Liability of owners or keepers for animals roaming at large—County public roads

Research References

West's Key Number Digest

Animals 🔑1 to 14, 16 to 37, 47 to 113

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 929
Selecting the Jury—Defense View, 5 Am. Jur. Trials 473
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 5:1 General instructions—Wild animals

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a "wild animal" is a type of animal that is not customarily domesticated or devoted to the service of man when and where it is kept, whether or not the individual animal is docile or familiar with men. If you find from a preponderance of the evidence in this case that:

1. ________ *[The defendant]* owned or kept a wild animal;
2. The wild animal injured ________ *[the plaintiff]*; and
3. The actions causing the injury resulted from a dangerous propensity or characteristic of a wild animal of this particular class, and the animal was naturally inclined to commit these actions;

your verdict shall be for the plaintiff on this claim, even though: (1) the owner or keeper was not negligent to keep the animal; and (2) the owner or keeper had no notice that this particular animal was dangerous.

However, if you find that the plaintiff has failed to prove any of these three elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Yazoo & M. V. R. Co. v. Gordon, 184 Miss. 885, 186 So. 631, 632 (1939); Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861, 863, 42 A.L.R. 254 (1925); Phillips v. Garner, 106 Miss. 828, 64 So. 735, 736 (1914).

What is a "wild" animal? Generally as to what constitutes a wild animal, see 4 Am. Jur. 2d, Animals § 2.

Employer liability for injury sustained during animal care. A victim who was specifically employed to assist in caring for the wild animal causing injury may not be able to recover under a theory of strict liability as contemplated by the foregoing model instruction. His right of action may be governed, at least in part, by the rules applying to master and servant. For a general discussion of an employer's liability to his employees for injuries inflicted by animals and the defense of assumption of risk in that regard, see 4 Am. Jur. 2d Animals § 89.

Research References

Model Codes and Restatements

Restatement Second, Torts §§ 506, 507

§ 5:2 General instruction—Domestic animals

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the owner or keeper of a domestic animal is required to know the habits and propensities of its particular class of animal and, to the extent such habits and propensities are likely to cause injury under particular circumstances, must exercise reasonable care to guard against those habits and propensities. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[The defendant]* owned or kept a domestic animal;
2. The ________ *[animal]* was not known to be abnormally dangerous but was likely to cause harm under these circumstances;
3. ________ *[The defendant]* failed to exercise reasonable care under the circumstances to control this animal; and
4. ________ *[The defendant's]* failure to exercise such reasonable care proximately caused injury to ________ *[the plaintiff]*;

your verdict shall be for the plaintiff on this claim.

However, if you find that the plaintiff has failed to prove any of these four elements by a preponderance of the evidence, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Poy v. Grayson, 273 So. 2d 491, 494 (Miss. 1973); George v. Perkins, 221 So. 2d 717, 717 (Miss. 1969); Pennyan v. Alexander, 229 Miss. 704, 91 So. 2d 728, 732, 59 A.L.R.2d 1321 (1957); Yazoo & M. V. R. Co. v. Gordon, 184 Miss. 885, 186 So. 631, 632 (1939).

Research References

Model Codes and Restatements

Restatement Second, Torts § 518

§ 5:3 General instruction—Domesticated animals

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Owners or keepers of animals may be liable for the harm inflicted by those animals in certain situations. If you find from a preponderance of the evidence in this case that:

1. ________ *[Name of Defendant]* owned or kept a domestic animal; and
2. The ________ *[animal]* had exhibited some dangerous propensity or disposition prior to the ________ *[describe incident at issue]*; and
3. ________ *[Name of Defendant]* knew or reasonably should have known of this propensity or disposition; and
4. ________ *[Name of Defendant]* reasonably should have foreseen that the animal was likely to ________ *[cause this harm or injure someone]*; and
5. ________ *[Name of Defendant]* failed to exercise reasonable care under the circumstances to control this animal; and
6. ________ *[Defendant's]* failure to exercise such reasonable care proximately caused injury to ________ *[name of Plaintiff]*;

then your verdict shall be for the plaintiff on this claim.

However, if you find that the plaintiff has failed to prove any of these six elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Mongeon v. A & V Enterprises, Inc., 733 So. 2d 170 (Miss. 1997); Poy v. Grayson, 273 So. 2d 491, 494 (Miss. 1973); George v. Perkins, 221 So. 2d 717, 717 (Miss. 1969); Pennyan v. Alexander, 229 Miss. 704, 91 So. 2d 728, 732, 59 A.L.R.2d 1321 (1957); Yazoo & M. V. R. Co. v. Gordon, 184 Miss. 885, 186 So. 631, 632 (1939).

Animals as Basis for Private Nuisance Action. See Lambert v. Matthews, 757 So. 2d 1066 (Miss. Ct. App. 2000) (recognizing that animals could keep surrounding landowners from reasonable use and enjoyment of their property).

Landlord Liability for Animals. See Mongeon v. A & V Enterprises, Inc., 733 So. 2d 170 (Miss. 1997) (discussing that landlord must have actual or constructive knowledge of the pet's dangerous propensities).

What does "dangerous propensity" mean? Mississippi has not yet clearly defined the behavior which constitutes an exhibition of a dangerous propensity. In Mongeon v. A & V Enterprises, Inc., 733 So. 2d 170 (Miss. 1997), Mississippi looked to the following decisions from sister states:

Boosman v. Moudy, 488 S.W.2d 917 (Mo. Ct. App. 1972) ("Any tendency of a dog to injure persons, whether the dog acts from a purpose to do bodily harm, from ill temper, or only playfulness, is a dangerous propensity for which a keeper who has reason to know of such habit will be liable.").

Farrior v. Payton, 57 Haw. 620, 562 P.2d 779 (1977) ("The terms 'vicious propensities' and 'dangerous propensities' have been defined as 'any propensity on the part of the dog, which is likely to cause injury under the circumstances in which the person controlling the dog places it . . . and a vicious propensity does not mean only the type of malignancy exhibited by a biting dog, that is, a propensity to attack human beings.' ").

Research References

Model Codes and Restatements

Restatement Second, Torts § 518

§ 5:4 Standard of care—Owners or keepers of abnormally dangerous domestic animals

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that if the owner or keeper of a domestic animal knows or should know that the animal has a dangerous propensity or vicious disposition abnormal to its class, then that owner or keeper is liable for the harm caused by that animal's dangerous propensity or vicious disposition, even when *[he/she/it]* has exercised the utmost care to prevent the animal from doing harm.

NOTES TO FORM

Practice Notes

Mongeon v. A & V Enterprises, Inc., 733 So. 2d 170, 171-72 (Miss. 1997);

Poy v. Grayson, 273 So. 2d 491, 494 (Miss. 1973); Pennyan v. Alexander, 229 Miss. 704, 91 So. 2d 728, 732, 59 A.L.R.2d 1321 (1957).

Research References

Model Codes and Restatements

Restatement Second, Torts § 509

§ 5:5 Liability of owners or keepers for animals roaming at large—Highways

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that when an animal, through its owner's negligence, is roaming at large on a federal or state highway, or highway right-of-way, and causes damage as a result of a wreck, loss of life, or bodily injuries, the owner or keeper of that animal is liable for the damage or injury.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 69-13-111- (amended to delete burden on owner of livestock to prove lack of negligence).

Carpenter v. Nobile, 620 So. 2d 961, 962-63 (Miss. 1993) (holding that statutory imposition of liability under § 69-13-111 which creates presumption that owner of animal at large is negligent, likewise raises presumption of proximate causation) (prior version of statue).

Because of the application of Miss. Code Ann. § 69-13-111, this instruction should not be used in an action arising from an incident on a county road, but should only be used if the incident occurred on a federal or state highway (including right-of-way).

For a discussion of the history leading to imposition of absolute statutory liability for damage caused by trespassing livestock, see the dicta contained in Pongetti v. Spraggins, 215 Miss. 397, 61 So. 2d 158, 160-61, 34 A.L.R.2d 1277 (1952).

§ 5:6 Liability of owners or keepers for livestock roaming onto lands of another

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the owner or keeper of livestock must not permit the livestock to run at large upon the open or unfenced lands of another and must keep the livestock confined in a safe enclosure or upon *[his/her/its]* own lands. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[The defendant]* owned or kept livestock; and
2. The livestock entered onto the lands, grounds or premises of another person; and
3. The entry of the livestock onto such lands, grounds or premises caused damage or injury to ________ *[the plaintiff]*;

your verdict shall be for the plaintiff.

However, if you find that the plaintiff has failed to prove any of these three elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. §§ 69-13-1, 69-13-19.

Stephens v. Brock, 568 So. 2d 702, 705 (Miss. 1990); Galloway v. Brown, 230 Miss. 471, 93 So. 2d 459, 462-63 (1957); Minor v. Dockery, 125 Miss. 727, 88 So. 321, 321 (1921) (declaring that statute imposing absolute liability for damage by trespassing livestock eliminates question of due care and negligence on part of owner in confining such animal(s)).

§ 5:7 Liability of owners or keepers for animals roaming at large—County public roads

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the owner or keeper of a domestic animal is required to exercise reasonable care to prevent the animal from being at large and unattended under circumstances under which it is reasonably foreseeable that injury would result from the animal being at large on a county public road. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[The defendant]* owned or kept a domestic animal; and
2. ________ *[The defendant]* failed to exercise reasonable care to keep the animal from being at large and unattended under circumstances in which it was reasonably foreseeable that injury would result from the animal being at large on a county public road; and
3. ________ *[The defendant's]* failure to exercise such reasonable care proximately caused injury to ________ *[the plaintiff]* who collided with such animal while operating *[his/her]* vehicle upon a county public road;

your verdict shall be for the plaintiff on this claim.

However, if you find that the plaintiff has failed to prove any of these three elements, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Miss. Code Ann. §§ 69-13-1 et seq.

Barrett v. Parker, 757 So. 2d 182, 189 (Miss. 2000); George v. Perkins, 221 So. 2d 717, 718 (Miss. 1969).

Chapter 6

Assault and Battery

§ 6:1 General instruction
§ 6:2 Assault defined
§ 6:3 Battery defined
§ 6:4 Self-defense
§ 6:5 Defense of third persons
§ 6:6 When aggressor may act in self-defense
§ 6:7 Insulting words

Research References

West's Key Number Digest

Assault and Battery 🔑1 to 46

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 6:1 General instruction

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that every person has a right to be free from assault, which includes the right to be free from the apprehension of harmful or offensive bodily contact and every person has a right to be free from assault and battery, which includes the right to be free from harmful or offensive bodily contact. If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* committed an ________ *[unjustified]* assault, or an ________ *[unjustified]* assault and battery upon ________ *[plaintiff]*; and
2. Such ________ *[describe act]* took place without provocation;

then ________ *[defendant]* is liable to ________ *[plaintiff]* for any damages proximately caused by the ________ *[describe act]*.

However, if you find that the plaintiff has failed to prove either of these two elements by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Williams v. Clark, 236 Miss. 423, 110 So. 2d 365 (1959); Pittman v. Partin, 236 Miss. 517, 111 So. 2d 238 (1959).

Research References

Model Codes and Restatements

Restatement Second, Torts § 13

§ 6:2 Assault defined

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that an assault is an attempt to do bodily harm to or inflict injury on another, made by a person with the apparent present ability to inflict bodily harm or injury, under circumstances that give rise to a reasonable apprehension that bodily harm or injury will occur. If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* attempted to do bodily harm or inflict injury on ________ *[plaintiff]*; and
2. ________ *[Defendant]* had the apparent ability to bring about this bodily harm or inflict injury; and
3. ________ *[Defendant's]* actions reasonably caused ________ *[plaintiff]* apprehension of immediate bodily harm or injury;

then your verdict shall be for the plaintiff on this claim.

However, if you find that the plaintiff has failed to prove any of these three elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Johnson v. Cumberland, 91 So. 3d 646 (Miss. Ct. App. 2012); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935); Gill v. L.N. Dantzler Lumber Co., 153 Miss. 559, 121 So. 153 (1929).

Research References

Legal Encyclopedias

C.J.S., Assault and Battery § 4

Model Codes and Restatements

Restatement Second, Torts § 21

§ 6:3 Battery defined

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a battery is an intentional, unpermitted and unprivileged offensive contact with the person of another. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* intentionally caused an unprivileged contact with ________ *[plaintiff's]* person or with anything worn or held by ________ *[plaintiff]* by ________ *[describe act]*; and
2. ________ *[Plaintiff]* did not consent to or permit this contact;

then your verdict shall be for the plaintiff on this claim.

However, if you find that the plaintiff has failed to prove either of these two elements by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Johnson v. Cumberland, 91 So. 3d 646 (Miss. Ct. App. 2012); Morgan v. Loyacomo, 190 Miss. 656, 1 So. 2d 510 (1941); Gill v. L.N. Dantzler Lumber Co., 153 Miss. 559, 121 So. 153 (1929).

Research References

Legal Encyclopedias

C.J.S., Assault and Battery § 7

Model Codes and Restatements

Restatement Second, Torts §§ 13 to 20

§ 6:4 Self-defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a person has the right to use reasonable force to defend *[himself/herself]* and *[his/her]* property against unprivileged and unjustified contacts, attacks or instrusions which *[he/she]* reasonably believes another is about to inflict. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Plaintiff]* made an unprivileged or unjustified attack or intrusion upon ________ *[defendant or the defendant's property]*; and
2. ________ *[Defendant]* used force against ________ *[plaintiff]* for the purpose of protecting ________ *[defendant or the defendant's property]*; and
3. ________ *[Defendant's]* use of this force was no greater than reasonably necessary to protect ________ *[himself/herself or his/her property]*;

then your verdict shall be for the defendant on the claim made against *[him/her]*.

NOTES TO FORM

Practice Notes

Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974); Holland v. Martin, 214 Miss. 1, 56 So. 2d 398 (1952); Stamps v. Polk, 143 Miss. 551, 108 So. 729 (1926); Lizana v. Lang, 90 Miss. 469, 43 So. 477 (1907); Stone v. Heggie, 82 Miss. 410, 34 So. 146 (1903); Jamison v. Moseley, 69 Miss. 478, 10 So. 582 (1892).

Research References

Model Codes and Restatements

Restatement Second, Torts §§ 63, 65, 67

§ 6:5 Defense of third persons

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a person has the right to defend another person from harmful or offensive contact when *[he/she]* reasonably believes that such defense is necessary. In defending such other person, the defendant must use no more force than is reasonably necessary to protect *[him/her]*. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* reasonably believed that ________ *[a third person]* was in danger of harmful or offensive bodily contact from ________ *[plaintiff]*; and
2. ________ *[Defendant]* used force against ________ *[plaintiff]* to protect ________ *[a third person]* from this harmful or offensive contact; and
3. ________ *[Defendant]* used no more force than was reasonably necessary to protect ________ *[a third person]*;

your verdict shall be for the defendant on the claim made against *[him/her]*.

NOTES TO FORM

Practice Notes

Rogers v. Huber, 239 So. 2d 333 (Miss. 1970).

Research References

Model Codes and Restatements

Restatement Second, Torts § 76

§ 6:6 When aggressor may act in self-defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that one who provokes an attack or who makes it necessary for another person to defend *[himself/herself]*, may still act in self-defense if in good faith such person declines further combat with the other person, and clearly informs *[him/her]*, by words or acts, of *[his/her]* desire to have peace and abandon the contest. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* by ________ *[describe act]* provoked

an attack or started physical combat with ________ *[plaintiff]*, thereby making it necessary for ________ *[plaintiff]* to defend *[himself/herself]*; and

2. ________ *[Defendant]* then, in good faith, declined further combat and clearly informed ________ *[plaintiff]* by ________ *[describe words or acts]* of *[his/her]* desire to have peace and abandon the contest; and
3. ________ *[Plaintiff]* then continued the combat; and
4. ________ *[Defendant]* then used force against ________ *[plaintiff]* for the purpose of protecting *[his/her]* ________ *[person or property]*; and
5. ________ *[Defendant's]* use of this force was no more than reasonably necessary to protect ________ *[himself/herself or his/her property]*;

then your verdict shall be for the defendant on the claim made against *[him/her]*.

NOTES TO FORM

Research References

Legal Encyclopedias

Am. Jur. 2d, Assault and Battery § 106
C.J.S., Assault and Battery § 19

Model Codes and Restatements

Restatement Second, Torts § 63 Comment K

§ 6:7 Insulting words

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that an assault or an assault and battery may be excused or justified if the plaintiff used insulting words directed toward the defendant at the time of the assault or assault and battery. Accordingly, if you find from a preponderance of the evidence in this case that ________ *[plaintiff]* directed toward ________ *[defendant]* words that are ordinarily considered to be insulting in their general usage, then you may consider whether such words were sufficient excuse or justification for any assault or assault and battery that the defendant may have committed. If you find that such words are a sufficient excuse or justification, then your verdict may be for the defendant on the claim made against *[him / her]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 99-17-19.

Choate v. Pierce, 126 Miss. 209, 88 So. 627 (1921) Wicker v. State, 107 Miss. 690, 65 So. 885 (1914).

Research References

Legal Encyclopedias

C.J.S., Assault and Battery §§ 13 et seq.

Chapter 7

Bailment

§ 7:1 Definition
§ 7:2 General instruction
§ 7:3 Mutually beneficial bailment—Bailor's duty
§ 7:4 Bailment for hire—Consideration
§ 7:5 Gratuitous bailment—General instructions
§ 7:6 —Bailor's duty
§ 7:7 Delivery of bailment goods to the owner
§ 7:8 Destruction of bailment property by act of God

Research References

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Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

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§ 7:1 Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a bailment exists when one person, the bailor, places personal property with another person, the bailee, under an agreement that the property will be stored, delivered or returned in an agreed-upon manner.

NOTES TO FORM

Practice Notes

Hibernia Bank & Trust Co. v. Turner, 156 Miss. 842, 127 So. 291 (1930); Miller v. Bank of Holly Springs, 131 Miss. 55, 95 So. 129, 31 A.L.R. 698 (1923).

Research References

Legal Encyclopedias

Am. Jur. 2d, Bailments § 2

§ 7:2 General instruction

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a bailee has the duty to exercise reasonable care to preserve property that *[he/she/it]* has accepted under a bailment for the mutual benefit of both the bailor and bailee. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Plaintiff]* delivered ________ *[describe property]* to ________ *[defendant]*; and

2. The delivery acceptance of this ________ *[describe property]* was for the mutual benefit of ________ *[plaintiff]* and ________ *[defendant]*; and

3. ________ *[Defendant]* failed to exercise reasonable care to preserve the ________ *[describe property]*; and

4. ________ *[Defendant's]* failure to exercise reasonable care to preserve the ________ *[describe property]* proximately caused loss or damage to the ________ *[describe property]*;

then your verdict shall be for the plaintiff on this claim.

However, if the plaintiff has failed to prove any one of these four elements by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Pope v. Andrews, 361 So. 2d 71 (Miss. 1978); Matthews v. Carpenter, 231 Miss. 677, 97 So. 2d 522 (1957); Black v. Stone County Lumber Co., 216 Miss. 844, 63 So. 2d 405 (1953); Yazoo & M.V.R. Co. v. Hughes, 94 Miss. 242, 47 So. 662 (1908).

§ 7:3 Mutually beneficial bailment—Bailor's duty

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that in a bailment for the mutual benefit of both the bailor and bailee, the bailor has the duty to exercise reasonable care to make the property that is the subject of the bailment reasonably safe for its intended purpose, and to inform the bailee of any unsafe conditions in the property of which the bailor knows or should know. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* placed ________ *[describe property]* in the care of ________ *[plaintiff]* under an agreement that was for the mutual benefit of both ________ *[plaintiff]* and ________

[defendant], and under the terms of which the ______ *[describe property]* would be ______ *[stored or rented or delivered]* in accordance with the agreement of the parties; and

2. ______ *[Defendant]* failed to exercise reasonable care to see that the ______ *[describe property]* was reasonably safe for its intended purpose or to inform ______ *[plaintiff]* of any unsafe condition in the ______ *[describe property]* of which ______ *[defendant]* knew or should have known; and

3. The plaintiff was a foreseeable user of the ______ *[describe property]* ______ or could foreseeably have been endangered by the probable use of this ______ *[describe property]*; and

4. The defendant's failure to exercise reasonable care proximately caused injury or damage to the plaintiff;

then your verdict shall be for the plaintiff on this claim.

However, if the plaintiff has failed to prove any one of these four elements by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Hertz Corp. v. Goza, 306 So. 2d 657 (Miss. 1974); Thompson v. Reily, 211 So. 2d 537 (Miss. 1968); Federal Compress & Warehouse Co. v. Swilley, 252 Miss. 103, 171 So. 2d 333 (1965).

Research References

Legal Encyclopedias

C.J.S., Bailments § 25

Model Codes and Restatements

Restatement Second, Torts § 408

§ 7:4 Bailment for hire—Consideration

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the consideration for a bailment for hire need be some advantage or benefit to the bailee or a forfeiture of right to *[his/her/its]* property by the bailor.

NOTES TO FORM

Practice Notes

Miller v. Bank of Holly Springs, 131 Miss. 55, 95 So. 129, 31 A.L.R. 698 (1923); Grenada Bank v. Moore, 131 Miss. 339, 95 So. 449 (1923).

§ 7:5 Gratuitous bailment—General instructions

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that if a bailment is solely for the benefit of the bailor, the bailee is liable for *[his/her/its]* willful failure to deliver the bailor's property or for *[his/her/its]* gross negligence in failing to care for or deliver the property. Thus a bailee is required to exercise only slight care and diligence with respect to the property. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Plaintiff]* delivered ________ *[describe property]* to ________ *[defendant]*; and
2. The delivery and acceptance of this ________ *[describe property]* was for the benefit of ________ *[plaintiff]* alone; and
3. ________ *[Defendant]* was grossly negligent in *[his/her/its]* care of the ________ *[describe property]* or failed to exercise even slight care and diligence with respect to the ________ *[describe property]*; and
4. ________ *[Defendant's]* gross negligence or failure to exercise slight care and diligence proximately caused loss or damage to the ________ *[describe property]*;

then your verdict shall be for the plaintiff on the claim.

However, if the plaintiff has failed to prove any one of these four elements by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Research References

Legal Encyclopedias
C.J.S., Bailments §§ 8 et seq.

§ 7:6 Gratuitous bailment—Bailor's duty

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that if a bailment is solely for the benefit of the bailee, the bailor is obligated to inform the bailee of any defects or dangers in the property which *[he/she/it]* is actually aware of. The bailor is under no duty to examine or inspect the property before delivering it to the bailee. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* delivered ________ *[describe property]* to ________ *[plaintiff]*; and
2. The delivery and acceptance of this ________ *[describe property]* ________ was for the benefit of ________ *[plaintiff]* alone; and
3. ________ *[Defendant]* failed to inform ________ *[plaintiff]* of defects in the ________ *[describe property]* ________ which *[he/she/it]* was actually aware of; and
4. It was reasonably foreseeable that ________ *[plaintiff]* could have been endangered by the use of this ________ *[describe property]* ________; and
5. ________ *[Defendant's]* failure to inform ________ *[plaintiff]* of the defects in the ________ *[describe property]* proximately caused damage or loss to ________ *[plaintiff]*;

then your verdict shall be for the plaintiff on this claim.

However, if the plaintiff has failed to prove any one of these five elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant on this claim.

NOTES TO FORM

Research References

Legal Encyclopedias

Am. Jur. 2d, Bailments § 96

§ 7:7 Delivery of bailment goods to the owner

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A bailee acquires no title to property that is entrusted to *[him / her / it]* in a bailment. A bailee may return the property to its true owner, if not to the bailor. On releasing property to one other than the bailor, the bailee has the burden to prove that the property was released to the true owner. A showing that the person to whom the property was returned owns the property is a complete defense to any claim of misdelivery of the property.

NOTES TO FORM

Practice Notes

Hattiesburg Auto Sales Co. v. Morrison, 136 Miss. 632, 101 So. 690, 43 A.L.R. 147 (1924); Abasi Bros. v. Louisville & N.R. Co., 115 Miss. 803, 76 So. 665 (1917).

§ 7:8 Destruction of bailment property by act of God

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a bailee is not liable for property entrusted to *[him/her/it]* by the bailor if such property is destroyed or damaged by an act of God while in the bailee's possession.

NOTES TO FORM

Practice Notes

Harry Dole Dodge of Pascagoula, Inc. v. Cox, 246 So. 2d 918 (Miss. 1971).

Chapter 8

Carriers

§ 8:1 Definition—Common carrier
§ 8:2 —Private or contract carriers
§ 8:3 General instruction—Carrier of passengers for hire
§ 8:4 Liability of common carrier—Loss or damage to goods—Exceptions
§ 8:5 Liability of private or contract carriers—Loss or damage to goods—Presumptions

Research References

West's Key Number Digest

Carriers 🔑1 to 408

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 5 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
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§ 8:1 Definition—Common carrier

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a common carrier is any ________ *[person or corporation]* which holds ________ *[himself or itself]* out as engaged in public service or transportation for all members of the general public for compensation.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 77-7-7(e).

Erwin Mills, Inc. v. Williams, 238 Miss. 335, 118 So. 2d 339 (1960); Ohio Oil Co. v. Fowler, 232 Miss. 694, 100 So. 2d 128 (1958).

§ 8:2 Definition—Private or contract carriers

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a private or contract carrier is any ________ *[person or corporation]* which undertakes, under special and individual contracts or agreements, to perform public service or transport passengers or property for compensation.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 77-7-7(f).

Erwin Mills, Inc. v. Williams, 238 Miss. 335, 118 So. 2d 339 (1960).

§ 8:3 General instruction—Carrier of passengers for hire

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a common carrier of passengers for hire is required to exercise the highest degree of care and precaution for the safety of its passengers that is consistent with the practical conduct of its business. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* was a common carrier of passengers;
2. ________ *[Plaintiff]* was a passenger on ________ *[describe vehicle]* owned or operated by ________ *[defendant]* while operating as a common carrier;
3. ________ *[Defendant]* failed to exercise the highest degree of care for ________ *[plaintiff's]* safety consistent with the practical conduct of ________ *[defendant's business]*; and
4. ________ *[Defendant's]* failure to exercise such care proximately caused injuries or damages to ________ *[plaintiff]*;

then your verdict shall be for the plaintiff on this claim.

However, if you find that the plaintiff has failed to prove any of these four elements by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Goodwin v. Gulf Transport Co., 453 So. 2d 1035 (Miss. 1984); Lambert v. Lott, 222 So. 2d 816 (Miss. 1969); Smith v. Dillon Cab Co., 245 Miss. 198, 146 So. 2d 879 (1962); Evans v. Jackson City Lines, 212 Miss. 895, 56 So. 2d 80 (1952); Yazoo & M. V. R. Co. v. Smith, 188 Miss. 856, 196 So. 230 (1940).

§ 8:4 Liability of common carrier—Loss or damage to goods—Exceptions

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a common carrier is responsible for any loss or damage to goods it carries, unless that loss or damage was caused by: (a) an act of God; (b) an act of the public enemy; (c) an act of public authorities; (d) the shipper; or (d) an inherent defect or vice in the goods. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Describe goods]* were delivered to ________ *[defendant]*, who was acting as a common carrier; and
2. ________ *[Plaintiff]* had, upon delivery of the goods to ________ *[defendant]*, performed all services and acts necessary to the shipment; and
3. ________ *[Plaintiff's]* ________ *[describe goods]* were lost or damaged while being transported by ________ *[defendant]* or after their arrival at their destination and before ________ *[plaintiff]* was given notice of their arrival and had a reasonable opportunity to remove them;

then your verdict shall be for the plaintiff on this claim, unless you find from a preponderance of the evidence in this case that the loss or damage was caused by: (a) an act of God; (b) an act of the public enemy; (c) an act of public authorities; (d) the shipper or owner; or (e) an inherent defect or vice in the goods.

However, if you find that the plaintiff has failed to prove any of the three elements listed above by a preponderance of the evidence in this case, your verdict shall be for the defendant on this claim.

NOTES TO FORM

Practice Notes

Illinois Cent. R. Co. v. Benoit Gin Co., 248 So. 2d 426 (Miss. 1971); Illinois Cent. R. Co. v. Paxton, 187 Miss. 858, 193 So. 915 (1940); Baltimore & O. R. Co. v. Johl & Bergman, 180 Miss. 593, 177 So. 778 (1938).

§ 8:5 Liability of private or contract carriers—Loss or damage to goods—Presumptions

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that where goods are delivered to a private or contract carrier and are lost or damaged while in the care of that carrier, it is presumed that the loss or damage occurred from the negligence of the private or contract carrier. Accordingly, if you find from a preponderance of the evidence in this case:

1. That ________ *[plaintiff]* delivered ________ *[describe goods]* to ________ *[defendant]*, while ________ *[defendant]* was acting as a private or contract carrier; and
2. That ________ *[describe goods]* were lost, damaged or destroyed while in the custody of ________ *[defendant]*;

then you are to presume that such loss, damage or destruction was caused by the negligence of ________ *[defendant]*.

NOTES TO FORM

Practice Notes

Hornsby v. Logaras, 210 Miss. 512, 49 So. 2d 837 (1951).

Chapter 9

Contracts

§ 9:1 Breach of contract—General
§ 9:2 Termination of contract for material breach
§ 9:3 Consideration required for enforceable contract
§ 9:4 Acts of God—No excuse for nonperformance
§ 9:5 Avoidance of contract for unilateral mistake
§ 9:6 Substantive unconscionability
§ 9:7 Procedural unconscionability
§ 9:8 Contracts terminable at will
§ 9:9 Indefiniteness
§ 9:10 Mutual assent required
§ 9:11 Agreement to reduce contract to writing
§ 9:12 Failure to read contract—Enforcement not barred
§ 9:13 Contract invalid for fraudulent misrepresentations
§ 9:14 Contracts obtained by duress
§ 9:15 Construing all provisions of a contract
§ 9:16 Interpreting contract to give effect to intent of the parties
§ 9:17 Contract construed against drafter
§ 9:18 Intentional interference—Definition
§ 9:19 Intentional interference—Generally
§ 9:20 Intentional interference—Requirement of knowledge
§ 9:21 —Intent
§ 9:22 —Malice
§ 9:23 —Justification for interference

Research References

West's Key Number Digest

Contracts 🔑275 to 355

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 65 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

Forms

Am. Jur. Legal Forms 2d, Infants §§ 144:4 to 144:33

Am. Jur. Pleading and Practice Forms, Contracts §§ 43 to 126

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§ 9:1 Breach of contract—General

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. — Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

[Name of plaintiff] has brought a breach of contract claim against *[name of defendant]*. *[Name of plaintiff]* has the burden to prove by a preponderance of the evidence:

(1) The existence of a valid and binding contract; and

(2) That *[name of defendant]* has broken, or breached, the contract.

NOTES TO FORM

Practice Notes

Business Communications, Inc. v. Banks, 90 So. 3d 1221, 1224–25 (Miss. 2012) (holding that monetary damages are a remedy for breach of contract, not an element of the claim).

§ 9:2 Termination of contract for material breach

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a party to a contract is entitled to terminate that contract if the other contracting party commits a material breach of the contract. A party's breach is material if it constitutes a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if it substantially defeats the purpose of the contract.

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* breached a contract with ________ *[plaintiff]*; and
2. The breach constituted a failure by ________ *[defendant]* to perform a substantial part of the contract or one or more of its essential terms or conditions, or substantially defeats the purpose of the contract;

then ________ *[plaintiff]* had the right to terminate the contract.

However, if you find that ________ *[plaintiff]* has failed to prove either of these elements by a preponderance of the evidence in this case, ________ *[plaintiff]* had no right to terminate the contract for a material breach.

NOTES TO FORM

Practice Notes

Olin Corp. v. Central Industries, Inc., 576 F.2d 642 (5th Cir. 1978); Gulf South Capital Corp. v. Brown, 183 So. 2d 802 (Miss. 1966); Matheney v. McClain, 248 Miss. 842, 161 So. 2d 516, 519 (1964).

Research References

Treatises and Practice Aids

15 Williston on Contracts § 44:55 (4th ed.)

Model Codes and Restatements

Restatement Second, Contracts § 241

§ 9:3 Consideration required for enforceable contract

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract must be supported by consideration to be enforceable. Consideration need not be of any particular or economic value. Nor does it need to be adequate or satisfactory in amount. Rather, any benefit to a person making the promise or detriment to person to whom the promise is made is sufficient consideration to support a contract. So long as the consideration is something of real value in the eyes of the law, it is sufficient. A consideration is sufficient if the person to whom the promise is made refrains from doing anything which *[he/she/it]* has the right to do, whether or not there is any actual loss to *[him/her/it]* or benefit to the party making the promise.

NOTES TO FORM

Practice Notes

York v. Georgia-Pacific Corp., 585 F. Supp. 1265 (N.D. Miss. 1984); Dabbs v. International Minerals & Chemical Corp., 339 F. Supp. 654, 664 (N.D. Miss. 1972), aff'd, 474 F.2d 1344 (5th Cir. 1973); Daniel v. Snowdoun Ass'n, 513 So. 2d 946 (Miss. 1987); American Olean Tile Co. v. Morton, 247 Miss. 886, 157 So. 2d 788, 790 (1963); Lowndes Co-op. Ass'n (AAL) v. Lipsey, 240 Miss. 71, 126 So. 2d 276 (1961); In re Sadler's Estate, 232 Miss. 349, 98 So. 2d 863 (1957); Ogle v. Durley, 223 Miss. 32, 77 So. 2d 688 (1955); Martin v. Dixie Planing Mill, 199 Miss. 455, 24 So. 2d 332, 334 (1946).

§ 9:4 Acts of God—No excuse for nonperformance

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that where natural disasters or other acts of God make it impossible to perform a contract, the nonperforming party is not excused or released from *[his/her/its]* contractual duties, unless a specific term of the contract excuses or releases *[him/her/it]*. Accordingly, if you find from a preponderance of the evidence in this case that ________ *[defendant]* failed to meet *[he/she/it]* contractual obligations to ________ *[plaintiff]*, and that this failure was proximately caused by a natural disaster or other act of God, then ________ *[defendant]'s* nonperformance was not excused by this fact alone, unless a specific contract term provided for such relief.

NOTES TO FORM

Practice Notes

Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc., 388 F. Supp. 1362, 1367 (N.D. Miss. 1975); Dravo Corp. v. Litton Systems, Inc., 379 F. Supp. 37 (S.D. Miss. 1974); U.S. Fidelity & Guaranty Co. v. Rob Homes, Inc., 323 So. 2d 105 (Miss. 1975); Browne & Bryan Lumber Co. v. Toney, 188 Miss. 71, 194 So. 296 (1940); Bunting v. Orendorf, 152 Miss. 327, 120 So. 182 (1929); U.S. Fidelity & Guaranty Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88 (1927); Piaggio v. Somerville, 119 Miss. 6, 80 So. 342 (1919).

§ 9:5 Avoidance of contract for unilateral mistake

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract may not be avoided or rescinded merely because one party to the contract has made a mistake due to inattention or negligence. However, a contract may be avoided or rescinded if one party has, without gross negligence or willful neglect, made a unilateral mistake so fundamental that the minds of the parties never met or that the other party has received an unconscionable advantage as a result. Accordingly, if you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]* has made a mistake by ________ *[describe mistake]*;
2. The mistake is so fundamental that the minds of the parties never met or that ________ *[plaintiff]* has received an unconscionable advantage as a result of the mistake; and
3. There was no gross negligence or willful neglect by ________ *[defendant]*, either in committing the mistake or in seeking relief from it;

then you may, in your discretion, return a verdict allowing ________ *[defendant]* to avoid or rescind the contract.

NOTES TO FORM

Practice Notes

Highlands Ins. Co. v. Allstate Ins. Co., 688 F.2d 398 (5th Cir. 1982); Hunt v. Davis, 208 Miss. 710, 45 So. 2d 350 (1950); Wall v. Wall, 177 Miss. 743, 171 So. 675 (1937).

§ 9:6 Substantive unconscionability

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract is unenforceable on the ground of unconscionability only if no person in *[his/her]* senses and not under a delusion would make that contract on the one hand, and no honest and fair person would accept that contract on the other hand. The fact that a contract is more favorable to one side than to the other does not alone render it unconscionable. Likewise, the fact that a contract is improvident will supply no basis for relief on the ground of unconscionability. A party who enters into an improvident or disadvantageous contract cannot for that reason seek relief from it in the absence of fraud, deceit, or fiduciary relations of some kind.

NOTES TO FORM

Practice Notes

York v. Georgia-Pacific Corp., 585 F. Supp. 1265 (N.D. Miss. 1984); Early

v. Williams, 239 Miss. 320, 123 So. 2d 446 (1960); In re Sadler's Estate, 232 Miss. 349, 98 So. 2d 863 (1957); Hunt v. Davis, 208 Miss. 710, 45 So. 2d 350 (1950); Terre Haute Cooperage v. Branscome, 203 Miss. 493, 35 So. 2d 537 (1948).

§ 9:7 Procedural unconscionability

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract may be invalidated for procedural unconscionability. To do so, it must appear from a preponderance of the evidence that the party challenging the contract, owing to the conduct of the other party, lacked knowledge about the terms arising from inconspicuous print or the use of complex legalistic language, disparity in sophistication of the parties, and lack of opportunity to study the contract and inquire about its terms. Procedural unconscionability also requires a lack of voluntariness, shown when the parties' relative bargaining power is unequal, the stronger party's terms are nonnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with some other party on more favorable terms or to refrain from contracting at all.

NOTES TO FORM

Practice Notes

York v. Georgia-Pacific Corp., 585 F. Supp. 1265 (N.D. Miss. 1984); Bank of Indiana, Nat. Ass'n v. Holyfield, 476 F. Supp. 104, 27 U.C.C. Rep. Serv. 635 (S.D. Miss. 1979).

§ 9:8 Contracts terminable at will

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract that does not contain a termination date is terminable at the will of either party. Accordingly, if you find from a preponderance of the evidence in this case that the contract between ________ *[plaintiff]* and ________ *[defendant]* did not contain a termination date, then ________ *[defendant]* had a right to terminate the contract at will.

NOTES TO FORM

Practice Notes

King v. Exxon Co., U.S.A., 618 F.2d 1111, 6 Fed. R. Evid. Serv. 948 (5th Cir. 1980); Roberts v. Southern Wood Piedmont Co., 571 F.2d 276 (5th Cir. 1978); First Mississippi Bank of Commerce v. Latch, 433 So. 2d 946 (Miss. 1983).

§ 9:9 Indefiniteness

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract will not be invalidated for uncertainty and lack of definiteness if the material terms of the contract can be ascertained either from the document itself or from all of the circumstances, including any relevant extrinsic evidence, commercial practice or custom and usage. Accordingly, if you find from a preponderance of the evidence in this case that the material terms of the contract between ________ *[plaintiff]* and ________ *[defendant]* can be determined, either from the written contract itself, or from all of the circumstances and evidence before you, then the contract is not unenforceable or invalid for uncertainty or lack of definiteness. However, if such material terms cannot be so determined, then the contract is unenforceable.

NOTES TO FORM

Practice Notes

J. Russell Flowers, Inc. v. Itel Corp., 495 F. Supp. 88 (N.D. Miss. 1980); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176 (N.D. Miss. 1970).

§ 9:10 Mutual assent required

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that an enforceable contract does not exist between two parties where they have not demonstrated a mutual assent to be bound. You are further instructed that the assent of the parties does not require an actual, subjective meeting of the minds. Rather, the parties' assent to the formation of a contract may be determined from their objective words, acts and outward expressions. Accordingly, if you find from a preponderance of the evidence in this case that ______ *[plaintiff's]* and ______ *[defendant's]* acts manifested an assent to be bound to a contract, then such mutual assent exists to form a contract.

However, if you find that plaintiff has failed to prove such mutual assent by a preponderance of the evidence in this case, then your verdict shall be for defendant.

NOTES TO FORM

Practice Notes

Jackson v. Sam Finley, Inc., 366 F.2d 148 (5th Cir. 1966); Morris v. Liberty Mut. Ins. Co., 659 F. Supp. 201 (N.D. Miss. 1987); A. Copeland Enterprises v. Pickett & Meador, Inc., 422 So. 2d 752 (Miss. 1982); Hill v. Capps, 248 Miss. 601, 160 So. 2d 186 (1964).

§ 9:11 Agreement to reduce contract to writing

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that where all the substantial terms of a contract have been agreed upon, the fact that the parties understood that a written contract would later be prepared does not render the parties' agreement unenforceable, unless the parties have intended that the contract should not be binding until executed.

NOTES TO FORM

Practice Notes

J. Russell Flowers, Inc. v. Itel Corp., 495 F. Supp. 88 (N.D. Miss. 1980); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176 (N.D. Miss. 1970).

§ 9:12 Failure to read contract—Enforcement not barred

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a party cannot avoid a written contract that *[he/she]* has signed on the ground that *[he/she]* did not read it or have someone read it to *[him / her]*, and that *[he / she]* thought the terms of the contract were different, unless *[he / she]* was induced not to read it or have someone read it to *[him / her]* by fraudulent representations made by another party to the contract.

NOTES TO FORM

Practice Notes

Dunn v. Dunn, 786 So. 2d 1045 (Miss. 2001); Pedersen v. Chrysler Life Ins. Co., 677 F. Supp. 472 (N.D. Miss. 1988); McCubbins v. Morgan, 199 Miss. 153, 23 So. 2d 926 (1945); Gunter v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720 (1928).

§ 9:13 Contract invalid for fraudulent misrepresentations

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract will be held invalid for fraudulent representations if the representations were made with the knowledge of their falsity, without the knowledge of their truth, or under such circumstances that their falsity ought to have been known; if the representations were material and were of a type which the other party to the contract might reasonably rely on; and if the other party to the contract did rely on them in entering into the contract. You are further instructed that the party seeking to invalidate the contract on this ground has the burden to establish the misrepresentations and their materiality by clear and convincing evidence.

Accordingly, if you find by clear and convincing evidence in this case that:

1. ________ *[Name of party]* made ________ *[describe representations]* to ________ *[name of party]* with knowledge of their falsity, without knowledge of their truth, or under such circumstances that their falsity ought to have been known to ________ *[name of party]*;

2. The representations were material and were of a type on which ________ *[name of party]* might reasonably rely; and
3. ________ *[Name of party]* did rely on them and enter into the contract;

then your verdict shall be for ________ *[name of party].*

However, if you find that ________ *[name of party]* has failed to prove any of these three elements by clear and convincing evidence, your verdict shall be for ________ *[name of party].*

NOTES TO FORM

Practice Notes

Jackson v. Sam Finley, Inc., 366 F.2d 148 (5th Cir. 1966); Pedersen v. Chrysler Life Ins. Co., 677 F. Supp. 472 (N.D. Miss. 1988); James v. Federal Royalty Co., 44 So. 2d 542 (Miss. 1950); Fornea v. Goodyear Yellow Pine Co., 181 Miss. 50, 178 So. 914 (1938).

§ 9:14 Contracts obtained by duress

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that contracts obtained by duress are void. In order to render a contract void on account of duress, the complaining party must have been deprived of the free exercise of *[his/her/its]* own free will, and the conduct of the dominant party must have overridden the volition of the victim. You are instructed that it is not sufficient for a finding of duress that one party insisted upon a legal right and the other party yielded to such an insistence.

NOTES TO FORM

Practice Notes

Rivervalley Co. v. Deposit Guaranty Nat. Bank, 331 F. Supp. 698 (N.D. Miss. 1971); Duckworth v. Allis-Chalmers Mfg. Co., 247 Miss. 198, 150 So. 2d 163 (1963).

§ 9:15 Construing all provisions of a contract

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that contracts are to be construed to give effect to all valid provisions, and that all provisions of a contract are to be construed as a whole, unless such a construction produces an unfair unreasonable result.

NOTES TO FORM

Practice Notes

McCain v. Cox, 531 F. Supp. 771 (N.D. Miss. 1982) aff'd, 692 F.2d 755 (5th Cir. 1982); Glantz Contracting Co. v. General Elec. Co., 379 So. 2d 912 (Miss. 1980); Texaco, Inc. v. Kennedy, 271 So. 2d 450 (Miss. 1973).

§ 9:16 Interpreting contract to give effect to intent of the parties

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that in interpreting a contract you should seek to give effect to the intent of the parties. The intentions of the parties are to be determined as much as possible from the language of the contract; where a contract is silent on any subject, you may also consider other extrinsic evidence. Unless it is clear that certain words are employed in a technical sense, the words of a contract are to be given their ordinary and usual meaning.

NOTES TO FORM

Practice Notes

Valley Cement Industries, Inc. v. Midco Equipment Co., 570 F.2d 1241 (5th Cir. 1978); Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355 (Miss. 1989); Estate of Hensley v. Estate of Hensley, 524 So. 2d 325 (Miss. 1988); Owen v. Gerity, 422 So. 2d 284 (Miss. 1982); Continental Cas. Co. v. Hester, 360 So. 2d 695 (Miss. 1978); Hoerner v. First Nat. Bank of Jackson, 254 So. 2d 754 (Miss. 1971); Miller v. Fowler, 200 Miss. 776, 28 So. 2d 837 (1947).

§ 9:17 Contract construed against drafter

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a contract is to be construed most strictly against the party who prepared it. Accordingly, any vague or ambiguous terms of a contract are to be construed against the drafter.

NOTES TO FORM

Practice Notes

Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355 (Miss. 1989); Clark v. Carter, 351 So. 2d 1333 (Miss. 1977); Stampley v. Gilbert, 332 So. 2d 61 (Miss. 1976).

§ 9:18 Intentional interference—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the tort of interference with contract is defined as the malicious interference with a valid and enforceable contract, which causes one party not to perform and results in injury to the other party.

In the context of this tort, "malicious" is defined as the intentional doing of a harmful act without legal or sound justification or excuse, in other words, the willful violation of a known right.

NOTES TO FORM

Practice Notes

Collins v. Collins, 625 So. 2d 786, 790 (Miss. 1993)(An action for interference with contract generally will lie against one who maliciously interferes with a valid and enforceable contract, causing one party not to perform and resulting in injury to the other party. In this context, "malicious" is defined as the intentional doing of a harmful act without legal or sound justification or excuse, in other words, the willful violation of a known right.) (citations omitted).

§ 9:19 Intentional interference—Generally

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

For the plaintiff to recover on *[his/her/its]* claim against the defendant, the plaintiff must prove, by a preponderance of the evidence, each of the following:

1. That the acts of the defendant were intentional and willful;
2. That the acts of the defendant were calculated to cause damage to the plaintiff in *[his / her / its]* lawful business;
3. That the acts of the defendant were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant, which acts constitute malice;
4. That actual damage or loss resulted; and
5. The acts of the defendant were the proximate cause of the loss or damage suffered by the plaintiff.

If the plaintiff has failed to prove any one or more of these elements by a preponderance of the evidence, then you shall find the defendant not liable for the tort of interference with contract.

NOTES TO FORM

Practice Notes

Alfonso v. Gulf Pub. Co., Inc., 87 So. 3d 1055, 1060 (Miss. 2012)(The elements of intentional interference with contract are: "(1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiff in his/her lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which acts constitute malice); and (4) that actual damage or loss resulted," and "(5) the defendant's acts were the proximate cause of the loss or damage suffered by the plaintiff.") (citations omitted).

§ 9:20 Intentional interference—Requirement of knowledge

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

You are instructed that in order for you to find for the plaintiff, you must also find from a preponderance of the evidence that the defendant knew of the existence of the contract between the plaintiff and ________ *[the breaching party]*.

Should the plaintiff fail to prove by a preponderance of the evidence that the defendant knew of the existence of the contract in question then your verdict must be for the defendant.

NOTES TO FORM

Practice Notes

Irby v. Citizens Nat. Bank of Meridian, 239 Miss. 64, 67, 121 So. 2d 118, 119 (1960) ("In an action for damages for procuring breach of a contract, the plaintiff must allege and prove the essential elements of the wrong. It is essential both to aver and prove the defendant's knowledge of the contract in question. Such knowledge is not pleaded sufficiently by a mere allegation that he maliciously prevented performance of the contract.") (citation omitted).

§ 9:21 Intentional interference—Intent

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that in order for the plaintiff to recover in this case the element of willfulness and calculation does not require a showing by the plaintiff that the defendant had a specific intent to deprive plaintiff of contract rights. The requisite intent can be inferred if it is proven by a preponderance of the evidence that the defendant knew of the existence of the contract and did a wrongful act without legal or social justification that *[he/she/it]* is certain or substantially certain will result in interference with the contract.

NOTES TO FORM

Practice Notes

Par Industries, Inc. v. Target Container Co., 708 So. 2d 44, 48 (Miss. 1998)(The element of willfulness and calculation does not require a showing on the part of the plaintiff that defendant had a specific intent to deprive plaintiff of contractual rights. Rather, the requisite intent is inferred when defendant knows of the existence of a contract and does a wrongful act without legal or social justification that he is certain or substantially certain will result in interference with the contract.) See Liston v. Home Ins. Co., 659 F. Supp. 276, 281 (S.D. Miss. 1986).

§ 9:22 Intentional interference—Malice

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.) Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that in the context of the tort of intentional interference "malice" is defined as the intentional doing of a harmful act without justification or excuse, or stated differently, the willful violation of a known right.

If you find by a preponderance of the evidence that the defendant had a justifiable interest and reason for acting, (or interfering with the contract) then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Liston v. Home Ins. Co., 659 F. Supp. 276, 281 (S.D. Miss. 1986); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1199-2000 (N.D. Miss. 1970); Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp., 743 So. 2d 954, 970 (Miss. 1999) (citing Vestal v. Oden, 500 So. 2d 954, 957 (Miss. 1986)).

§ 9:23 Intentional interference—Justification for interference

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.) Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that even if a party interferes with the formation or execution of a contract, if that party has a legitimate interest therein or a contractual right to perform, then said act is privileged and thus not wrongful. Accordingly should you find from a preponderance of the evidence that the defendant interfered with the formation or execution of a contract but also find that the defendant had a legitimate interest in the contract or was under a contractual right to perform then you must find for the defendant.

NOTES TO FORM

Practice Notes

Liston v. Home Ins. Co., 659 F. Supp. 276, 281 (S.D. Miss. 1986); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1199-2000 (N.D. Miss. 1970); Vestal v. Oden, 500 So. 2d 954 (Miss. 1986).

Chapter 10

Damages

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§ 10:3 Definition—Actual economic damages
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Research References

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Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

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§ 10:1 Definition—Nature of proof—Causation

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that damages is the word which expresses in dollars and cents the injury sustained by plaintiff.

In order to recover damages, they must be shown with reasonable probability both as to their nature and as to their cause. A plaintiff does not lose *[his/her/its]* right to recover damages because *[he/she/it]* is unable to prove with absolute certainty the mathematical value of *[his/her/its]* injury. If the cause of the injury is reasonably probable, you may reasonably estimate the damages, and the assessment thereof is within the discretion of the jury.

NOTES TO FORM

Practice Notes

See Miss. Code Ann. § 11–1–60(2) for limitations on noneconomic damages. However, the trier of fact is not to be instructed on the statutory limitations imposed on noneconomic damages.

Amiker v. Brakefield, 473 So. 2d 939 (Miss. 1985); Washburn v. Pearson, 226 So. 2d 758 (Miss. 1969).

§ 10:2 Definition—Noneconomic damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

"Noneconomic damages" means subjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury. The term "noneconomic damages" does not include punitive or exemplary damages.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-60.

See Miss. Code Ann. § 11-1-60(2) for limitations on noneconomic damages. However, the trier of fact is not to be instructed on the statutory limitations imposed on noneconomic damages.

§ 10:3 Definition—Actual economic damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

"Actual economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, disabilities, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-60.

The term "compensatory damages" is used interchangeably with "actual economic damages" throughout these instructions.

§ 10:4 General instruction—Compensatory or actual damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, should you find for the plaintiff in this case, you must confine your verdict to reasonable compensation for the injuries actually sustained, if any, by the plaintiff as a result of ________ *[specify wrongful act or conduct in question]*. Plaintiff's reasonable compensation, if any, does not include attorney's fees, nor does it allow a monetary award which constitutes a penalty against the defendant, nor are you limited by the estimates of damages made by the attorneys representing the parties to this lawsuit. The defendant is not responsible for any physical or mental problem that the plaintiff may have had prior to ________ *[specify wrongful act or conduct in question]*, nor any physical or mental problem that is not related to an injury the plaintiff might have suffered as a result of ________ *[specify wrongful act or conduct in question]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11–1–60.

Winston v. Cannon, 430 So. 2d 413 (Miss. 1983).

If the plaintiff has a preexisting physical or mental condition which is aggravated by the defendant's alleged conduct, the jury may be given an instruction to consider it. Harkins v. Paschall, 348 So. 2d 1019, 1021-22 (Miss. 1977); Tri-State Transit Co. v. Martin, 181 Miss. 388, 179 So. 349, 350 (1938).

§ 10:5 Discretion in determining amount—Factors to consider

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that just and fair compensation is a decision to be made by the jury. Your discretion as to the measure of damages is wide, but not unlimited, and you may not act arbitrarily. Exercise your discretion as to the amount of damages reasonably, intelligently and in harmony with the evidence of the case and the Court's instructions. The damages for personal injury cannot be assessed by any fixed rule, but you are the sole judges as to the measure of damages in this case.

Should your verdict be for the plaintiff in this case, you may consider the following factors to determine the amount of damages to award as may be shown by a preponderance of the evidence:

1. The type of injuries to the plaintiff, if any, and their duration.
2. Past, present and future physical pain and suffering and resulting mental anguish, if any [and the loss of enjoyment of life];
3. Reasonable and necessary medical expenses already incurred and those which are reasonably probable to be incurred in the future, if any.
4. Any future ________ *[disability or impairment]* that is reasonably probable to occur, its duration and its effect, if any, on the plaintiff's future ________ *[earnings or earning capacity].* In arriving at the amount of your award, if any, for loss of future ________ *[earnings or earning capacity]*, you should consider what the plaintiff's health, physical ability, age and earning power were before the injury and the effect of the plaintiff's injuries, if any, upon them.
5. Past lost wages.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-69(1) (In any civil action for personal injury there may be a recovery for pain and suffering and loss of enjoyment of life. However, there shall be no recovery for loss of enjoyment of life as a separate element of damages apart from pain and suffering damages, and there shall be no instruction given to the jury which separates loss of enjoyment of life from pain and suffering. . . .).

Miss. Code Ann. § 11-1-69(2) (In any wrongful death action, there shall be no recovery for loss of enjoyment of life caused by death).

See Miss. Code Ann. § 11–1–60(2) for limitations on noneconomic damages. However, the trier of fact is not to be instructed on the statutory limitations imposed on noneconomic damages.

§ 10:6 Mitigation of damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the plaintiff was under a duty after suffering harm, if any, to exercise due care and take reasonable steps to avoid or diminish the damages resulting from that harm. You are further instructed that the plaintiff is not entitled to damages for the harm that *[he/she/it]* could have avoided by the use of due care, nor for the harm which proximately resulted from *[his/her/its]* own conduct, if any, which contributed to *[his/her/its]* damages.

NOTES TO FORM

Practice Notes

Meridian Star v. Kay, 207 Miss. 78, 41 So. 2d 30, 10 A.L.R.2d 677 (1949); Yazoo & M. V. R. Co. v. Fields, 188 Miss. 725, 195 So. 489 (1940), error overruled, 188 Miss. 725, 196 So. 503 (1940).

For a discussion of the difference(s) between contributory negligence and avoidable consequences, see Munn v. Southern Health Plan, Inc., 719 F. Supp. 525, 527 (N.D. Miss. 1989). In a related case, the court discusses the effect of a superseding cause on issues of proximate cause and the resulting effect on a wrongful death award. Munn v. Algee, 730 F. Supp. 21, 23-24 (N.D. Miss. 1990), judgment aff'd, 924 F.2d 568, 32 Fed. R. Evid. Serv. 439 (5th Cir. 1991).

§ 10:7 Apportionment of fault—Procedure for computing damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you return a verdict for the plaintiff in this cause, then to allocate the amount of damages for which each defendant is liable, you should use the following procedure:

1. First, determine the total amount of damages you wish to award to the plaintiff: $________.
2. If you have determined, under other instructions given to you, that the plaintiff was guilty of negligence which proximately contributed to the event which caused ________ *[his/her]* own damages, determine or fix the percentage of fault to be allocated to plaintiff: ________ percent.

Allocate the amount of damages for which the plaintiff is liable for ________ *[his/her]* own damages in the proportion that ________ *[his/her]* percentage of fault bears to the entire amount of the verdict you have set forth in paragraph 1 above: $________.

3. If you have determined, under other instructions given to you, that there was some other participant in the event which caused the plaintiff's damages, and that participant is not a party to this lawsuit, you may nonetheless determine or fix a percentage of fault to be allocated to that nonparty participant: ________ percent.

Allocate the amount of damages for which the nonparty participant is liable in the proportion that ________ *[his/her]* percentage of fault bears to the entire amount of the verdict you have set forth in paragraph 1 above: $________.

4. If you have determined, under other instructions given to you, that the defendant ________ *[name of defendant 1]* is liable for all or a portion of the plaintiff's damages, determine or fix the percentage of fault to be allocated to defendant ________ *[name of defendant 1].*

Allocate the amount of damages for which defendant ________ *[name of defendant 1]* is liable in the proportion that ________ *[his/her]* percentage of fault bears to the entire amount of the verdict you have set forth in paragraph 1 above. $________.

5. If you have determined, under other instructions given to you, that the defendant ________ *[name of defendant 2]* is liable for all or a portion of the plaintiff's damages, determine or fix the per percentage of fault to be allocated to defendant ________ *[name of defendant 2].*

Allocate the amount of damages for which defendant ________ *[name of defendant 2]* is liable in the proportion that ________ *[his/her]* percentage of fault bears to the entire amount of the verdict you have set forth in paragraph 1 above. $________.

6. The combined total percentages of fault allocated to ________ *[the plaintiff]*, ________ *[the nonparty participant]*, ________ *[defendant 1]* and ________ *[defendant 2, etc.]* **must equal 100 percent**. Likewise, the combined total amount of damages allocated to ________ *[the plaintiff]*, ________ *[the nonparty participant]*, ________ *[defendant 1]* and ________ *[defendant 2, etc.]* **must equal the amount of the total verdict as set forth in Paragraph 1 herein**.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-7-15 (In all actions . . . for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property).

Miss. Code Ann. § 85-5-7(5) (In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor).

§ 10:8 Apportionment of fault—Procedure for computing damages—Special verdict form—Contributory negligence—Plaintiff listed first

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

SPECIAL VERDICT FORM, CONTRIBUTORY NEGLIGENCE

In returning your verdict in this case, you are to consider all of the facts and instructions of law given to you, and then return your verdict by completing this form. When a verdict has been reached by, *[five / nine]* or more members of the jury, write out your answers to the following questions on this form and notify the bailiff that you have reached your verdict.

1. Do you find from a preponderance of the evidence that the plaintiff, ________ *[name of plaintiff]*, was guilty of any negligence (fault) which was a proximate contributing cause to ________ *[his / her]* own injuries?

________ Yes
________ No

2. If your answer to Question No. 1 is "yes," please state the percentage of negligence (fault) for the plaintiff, ________ *[name of plaintiff]*, as compared to all of the negligence (fault) which caused ________ *[his / her]* own damages. ________ percent.

3. Do you find from a preponderance of the evidence that the defendant, ________ *[name of defendant 1]*, was guilty of any negligence (fault) which was a proximate contributing cause to the plaintiff's damages?

________ Yes
________ No

4. If your answer to Question No. 3 is "yes," please state the percentage of negligence (fault) for the defendant, ________ *[name of defendant 1]*, as compared to all of the negligence (fault) which caused the plaintiff's damages. ________ percent.

5. Do you find from a preponderance of the evidence that the defendant, ________ *[name of defendant 2]*, was guilty of any negligence (fault) which was a proximate contributing cause to the plaintiff's damages?

________ Yes
________ No

6. If your answer to Question No. 5 is "yes," please state the percentage of negligence (fault) for the defendant, ________ *[name of defendant 2]*, as compared to all of the negligence (fault) which caused the plaintiff's damages. ________ percent.

7. Do you find from a preponderance of the evidence that there was some other participant in the event which caused the plaintiff's damages, and that participant, who is not a party to this lawsuit, was a proximate contributing cause to the plaintiff's damages?

________ Yes
________ No

8. If your answer to Question No. 7 is "yes," please identify or name the nonparty participant and state the percentage of negligence (fault) for that participant as compared to all of the negligence (fault) which caused the plaintiff's damages.
________ *[Name or brief description of nonparty at fault.]*
________ percent.

If you find that any of the aforementioned persons is not guilty of any negligence, enter a 0 in the blank for that person.

THE TOTAL PERCENTAGES IN QUESTIONS NUMBERED 2, 4, 6 AND 8 MUST EQUAL 100 PERCENT.

9. What is the total amount of damages incurred by the plaintiff, ________ *[name of plaintiff]* as a result of the ________ *[accident or event]* in question? $________.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-7-15 (In all actions . . . for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property).

Miss. Code Ann. § 85-5-7(5) (In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor).

Baker & McKenzie, LLP v. Evans, 123 So. 3d 387, 409 (Miss. 2013) (Mississippi Supreme Court did not hold this instruction, as written, to be erroneous. The court wrote: We point out that the model jury instructions are only guidelines and have not been adopted by this Court. And in any event, we think the trial judge must have the discretion to modify a model charge when necessary so that it conforms with the facts, circumstances, and law that apply to the case being tried . . . . Technically speaking, asking a jury first to determine whether a plaintiff was guilty of fault which was a proximate cause of his or her damages should not matter. If there is fault, there is fault. And if the jury is fairly and properly instructed on the law and in turn so applies that law to the facts presented, the outcome should be the same regardless of who is first mentioned.).

§ 10:9 Apportionment of fault—Procedure for computing damages—Special verdict form—Contributory negligence—Plaintiff not listed first

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

SPECIAL VERDICT FORM, CONTRIBUTORY NEGLIGENCE

In returning your verdict in this case, you are to consider all of the facts and instructions of law given to you, and then return your verdict by completing this form. When a verdict has been reached by *[five/nine]* or more members of the jury, write out your answers to the following questions on this form and notify the bailiff that you have reached your verdict.

1. Do you find from a preponderance of the evidence that the defendant, *[name of defendant 1]*, was guilty of any negligence (fault) which was a proximate contributing cause to the plaintiff's damages?

☐ Yes

☐ No

2. If your answer to Question No. 1 is "yes," please state the percentage of negligence (fault) for the defendant, *[name of defendant 1]*, as compared to all of the negligence (fault) which caused the plaintiff's damages. ____ percent.

3. Do you find from a preponderance of the evidence that the defendant, *[name of defendant 2]*, was guilty of any negligence (fault) which was a proximate contributing cause to the plaintiff's damages?

☐ Yes

☐ No

4. If your answer to Question No. 3 is "yes," please state the percentage of negligence (fault) for the defendant, *[name of defendant 2]*, as compared to all of the negligence (fault) which caused the plaintiff's damages. ____ percent.

5. Do you find from a preponderance of the evidence that the plaintiff, *[name of plaintiff]*, was guilty of any negligence (fault) which was a proximate contributing cause to *[his/her]* own injuries?

☐ Yes

☐ No

6. If your answer to Question No. 5 is "yes," please state the percentage of negligence (fault) for the plaintiff, *[name of plaintiff]*, as compared to all of the negligence (fault) which caused *[his/her]* own damages. ____ percent.

7. Do you find from a preponderance of the evidence that there was some other participant in the event which caused the plaintiff's damages, and that participant, who is not a party to this lawsuit, was a proximate contributing cause to the plaintiff's damages?

☐ Yes

☐ No

8. If your answer to Question No. 7 is "yes," please identify or name the nonparty participant and state the percentage of negligence (fault) for that participant as compared to all of the negligence (fault) which caused the plaintiff's damages. *[Name of nonparty].* ____ percent.

If you find that any of the aforementioned persons is not guilty of any negligence, enter a 0 in the blank for that person.

THE TOTAL PERCENTAGES IN QUESTIONS NUMBERED 2, 4, 6 AND 8 MUST EQUAL 100 PERCENT.

9. What is the total amount of damages incurred by the plaintiff, *[name of plaintiff]* as a result of the *[accident/event]* in question? $________.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-7-15 (In all actions . . . for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property).

Miss. Code Ann. § 85-5-7(5) (In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages. Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasor).

Baker & McKenzie, LLP v. Evans, 123 So. 3d 387, 409 (Miss. 2013) (Mississippi Supreme Court wrote: Technically speaking, asking a jury first to determine whether a plaintiff was guilty of fault which was a proximate cause of his or her damages should not matter. If there is fault, there is fault. And if the jury is fairly and properly instructed on the law and in turn so applies that law to the facts presented, the outcome should be the same regardless of who is first mentioned).

§ 10:10 Joint tortfeasors—Indivisible verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find from a preponderance of the evidence in this case that the defendants consciously and deliberately pursued a common plan or design to commit ________ *[or "that the defendants 'actively took part in' "]* ________ *[identify the tortious or wrongful act]*, as defined for you in other instructions and your verdict is for the plaintiff, you must determine or fix the amount of your verdict and return it against all of the defendants whom you find liable. In returning a verdict for the plaintiff for ________ *[his/her]* actual or compensatory damages, you cannot return a verdict against one defendant for a certain amount and another verdict against another defendant for a different amount. The liability of the defendants is what the law calls "joint and several liability."

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 85-5-7(4).

§ 10:11 Nominal damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, should you find from a preponderance of the evidence in this case that the defendant, ________ *[name of defendant]*, committed or inflicted ________ *[a legal wrong or a trespass]* upon ________ *[name of plaintiff]*, but that plaintiff sustained no actual injury or monetary loss as a result thereof, you may return a verdict for plaintiff for nominal damages only. Nominal damages are a small and trivial sum which is awarded when a technical right has been violated and no actual injury occurs.

NOTES TO FORM

Practice Notes

ACI Chemicals, Inc. v. Metaplex, Inc., 615 So. 2d 1192 (Miss. 1993); Williams v. Wiggins, 285 So. 2d 163, 164-65 (Miss. 1973); Chevron Oil Co. v. Snellgrove, 253 Miss. 356, 175 So. 2d 471 (1965); Bumgart v. Bailey, 247 Miss. 604, 156 So. 2d 823 (1963); City of Laurel v. Bush, 238 Miss. 718, 120 So. 2d 149 (1960); Morrow v. Barron Motor Co., 229 Miss. 51, 90 So. 2d 20 (1956); Southland Co. v. Aaron, 224 Miss. 780, 80 So. 2d 823 (1955); Wells v. Branscome, 222 Miss. 1, 74 So. 2d 743 (1954); Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937); Poyner v. Gilmore, 171 Miss. 859, 158 So. 922 (1935).

This instruction should not be given in cases where plaintiff's proof would support a verdict for actual damages and defendant does not offer contradictory proof of no damages. This instruction should not be given if the proof supports a singular conclusion that the trespass or tort was willful. Williams v. Wiggins, 285 So. 2d 163 (Miss. 1973).

§ 10:12 Compensatory damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, if you find from a preponderance of the evidence in this case that the plaintiff has sustained actual damage as a proximate result of the ________ *[here state the basis of plaintiff's claim which is supported by the evidence, such as: (1) negligence; (2) breach of duty; (3) breach of contract, etc.]*, then the plaintiff is entitled to a verdict in an amount which will reasonably compensate the plaintiff for ________ *[his/her]* loss sustained. Such damages are called compensatory or actual damages and are awarded for the purpose of making the plaintiff whole again insofar as a money verdict can accomplish that purpose.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-60.

Lee v. Southern Home Sites Corp., 429 F.2d 290, 14 A.L.R. Fed. 598 (5th

Cir. 1970); Royal Oil Co., Inc. v. Wells, 500 So. 2d 439 (Miss. 1986); Williams v. Wiggins, 285 So. 2d 163 (Miss. 1973); Mississippi Power Co. v. Harrison, 247 Miss. 400, 152 So. 2d 892 (1963); Southland Co. v. Aaron, 224 Miss. 780, 80 So. 2d 823 (1955); Yazoo & M.V.R. Co. v. May, 104 Miss. 422, 61 So. 449 (1913).

Attorney's fees and costs are generally not recovered as a part of compensatory damages. City of Laurel v. Bush, 238 Miss. 718, 120 So. 2d 149, 155 (1960).

For annoyance and inconvenience as a proper element of compensatory damages, see Cumberland Telegraph & Telephone Co. v. Baker, 85 Miss. 486, 37 So. 1012 (1905). Inconsequential inconvenience, however, is not a proper element. Allen v. Edwards, 217 So. 2d 284 (Miss. 1969); Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937).

§ 10:13 Punitive damages—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that in determining whether or not you should award punitive damages in this case, you should bear in mind that the purpose of such an award is to punish the wrongdoer and to deter that wrongdoer from repeating such wrongful acts. In addition, such damages are also designed to serve as a warning to others, and to prevent others from committing such wrongful acts.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-65.

Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc., 725 So. 2d 902, 918 (Miss. 1998) (stating that trier of fact "shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole"); Bankers Life and Cas. Co. v. Crenshaw, 483 So. 2d 254 (Miss. 1985), judgment aff'd, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988).

§ 10:14 Punitive damages—Definition—Factors as to amount

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that punitive damages are added damages awarded for the social value in bringing a wrongful party to account for his/her/its actions and to discourage others from acting in a similar manner. Such damages are not awarded as a matter of right and are not based on the idea of benefitting an injured party, but are instead founded on the premise of punishing the wrongdoer. The paramount purpose in awarding punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others, while the purpose of compensatory damages is to make the plaintiff whole. Punitive damages may be awarded if you determine: (1) that the plaintiff is entitled to compensatory damages; and (2) if the plaintiff has proven by clear and convincing evidence that the defendant acted with actual malice or gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. In assessing the amount of punitive damages, if any, which are appropriate in this cause, you may consider:

1. The financial condition and net worth of the defendant;
2. The nature and reprehensibility of the defendant's wrongdoing, for example, the impact on the plaintiff, or the relationship of the plaintiff and defendant;
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation for causing same;
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal it;
5. Any other relevant factor shown by the evidence.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-65(1)(e) (factors to consider in awarding punitive damages); Miss. Code Ann. § 11-1-65(3)(a) (limits on punitive damages); Miss. Code Ann. § 11-1-65(3)(c) (trier of fact is not instructed on limits on punitive damages).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 737 to 741 (Spring 1994)

§ 10:15 Punitive damages—Elements of proof

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, before you can award punitive damages to the plaintiff in this case, you must first find by clear and convincing evidence that the defendant:

a. Acted with actual malice; or

b. Acted with gross negligence which evidences a willful, wanton or reckless disregard for the safety of others; or

c. Committed actual fraud.

If you fail to find any of the above conduct, then you may not consider assessing punitive damages against the defendant(s) in this case.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-65(1)(a) (elements of proof for awarding punitive damages); Miss. Code Ann. § 11-1-65(3)(a) (limits on punitive damages); Miss. Code Ann. § 11-1-65(3)(c) (trier of fact is not instructed on limits on punitive damages).

§ 10:16 Punitive damages—Form of verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should *[five/nine]* or more of you agree on the verdict in this case, it shall be brought back in one of the following forms:

1. If you find for the plaintiff on only the question of ________ *[actual or compensatory]* damages, the form of your verdict will be:
"We, the jury, find for the plaintiff in the amount of $________ *[actual or compensatory]* damages."
2. If you find for the plaintiff and assess punitive damages, the form of your verdict will be:
"We, the jury, find for the plaintiff in the amount of $________ *[actual or compensatory]* damages and $________ punitive damages."
3. If you find for the defendant, the form of your verdict will be:
"We, the jury, find for the defendant."

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-65; Miss. Code Ann. § 13-5-93.

Capital Transp. Co. v. McDuff, 319 So. 2d 658, 660-61 (Miss. 1975).

This instruction should be adjusted to include additional defendants when appropriate. The jury may return a verdict against one defendant and not the other(s), even if the defendants are principal/agent (i.e., employer/employee) and the doctrine of respondeat superior applies. Meena v. Wilburn, 603 So. 2d 866, 871-72 (Miss. 1992); Golden Flake Snack Foods, Inc. v. Thornton, 548 So. 2d 382, 384 (Miss. 1989); Capital Transp. Co. v. McDuff, 319 So. 2d 658, 660-61 (Miss. 1975). For purposes of liability and apportionment of damages, however, the principal/agent or employer/employee are considered as one defendant when the liability of the employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent. Miss. Code Ann. § 85-5-7.

§ 10:17 Statutory penalty—Cutting or injuring trees—Without the owner's consent

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, if you find for the plaintiff in this case, ________ *[he/she]* is entitled to damages equal to double the fair market value of each tree cut down, deadened, destroyed or taken away, together with the reasonable cost of reforestation, which cost of reforestation shall not exceed $250 per acre. The plaintiff is entitled to recover ________ *[his/her]* damages, regardless of the fact that the defendant may have acted in good faith or by honest mistake.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 95-5-10(1).

The remedies provided by Miss. Code Ann. § 95-5-10 are exclusive for cutting, deadening, destroying or removing trees, despite the fact that the trees may have been destroyed by a defendant acting in good faith or by honest mistake. A plaintiff may recover additional damages for losses other than those specified in the statute, such as damage to other property or to persons. An award of attorney fees and expert witness fees is within the court's discretion. Miss. Code Ann. § 95-5-10(1), (3).

A one year statute of limitations applies to the "penal" portions of Miss. Code Ann. § 95-5-10. Specifically, payment of an amount in excess of compensation for the fair market value of the trees has been held penal in nature and controlled by Miss. Code Ann. § 15-1-33.

§ 10:18 Statutory penalty—Intentionally cutting or injuring trees—Without the owner's consent

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, should you find from a preponderance of the evidence in this case, that ________ *[defendant]* or ________ *[agents/employees of defendant]* willfully, knowingly and in conscious disregard for the rights of ________ *[plaintiff]*, cut down, deadened, destroyed or took away ________ *[plaintiff's]* trees, then ________ *[plaintiff]* is entitled to:

1. Double the fair market value of each tree cut down, deadened, destroyed or taken away, together with the reasonable cost of reforestation, which cost of reforestation shall not exceed $250 per acre; and
2. The sum of $55 for every tree so cut down, deadened, destroyed or taken away if such tree is seven inches or more in diameter at a height of 18 inches above ground level, as established by a preponderance of the evidence; or
3. The sum of $10 for every such tree so cut down, deadened, destroyed or taken away if such tree is less than seven inches in diameter at a height of 18 inches above ground level, as established by a preponderance of the evidence.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 95-5-10(2).

See Miss. Code Ann. § 95-5-29.

An award of attorney fees and expert witness fees is within the court's discretion. Miss. Code Ann. § 95-5-10(3).

§ 10:19 Personal injury—Subsequent injury due to impaired physical condition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If defendant's negligent act has impaired the plaintiff's physical condition so that the plaintiff is subsequently injured, the defendant is liable for the entire injury.

NOTES TO FORM

Practice Notes

This instruction should be expanded to incorporate a recitation of the factual circumstances of the case in which it is used.

This instruction may only be granted if the defendant's negligence conclusively caused the original injury that left the plaintiff in a debilitated condition.

McClendon v. Reynolds Elec. and Engineering, 432 F.2d 320 (5th Cir. 1970); Brake v. Speed, 605 So. 2d 28, 31 (Miss. 1992) (when two forces join to cause single injury and apportionment of liability is not possible, both are liable for the entire injury).

Research References

West's Key Number Digest

Damages ⚷216(4)

Legal Encyclopedias

C.J.S., Damages § 185

Model Codes and Restatements

Restatement Second, Torts § 460

§ 10:20 Personal injury—Mental pain and anguish—Without physical injury

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, should you find for the plaintiff in this case, you may award damages for the plaintiff's mental suffering. In awarding such damages as you deem reasonable to the plaintiff, you should first consider the nature of the defendant's conduct. If you find from a preponderance of the evidence that the defendant's behavior was malicious, intentional, willful, wanton, grossly careless, indifferent or reckless, you may award the plaintiff damages for mental anguish without proof of a demonstrable harm or injury to the plaintiff. If, however, you find that the defendant was simply negligent in ______ *[his/her]* behavior, you may only award the plaintiff damages for mental suffering if the plaintiff proves, by a preponderance of the evidence, that ________ *[he/she]* has suffered some sort of demonstrative harm or injury and that said harm or injury was reasonably foreseeable to the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-60(2) (limits on noneconomic damages); Miss. Code Ann. § 11-1-60(2)(c) (trier of fact is not instructed on limits on noneconomic damages).

§ 10:21 Loss of consortium

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

I. You are instructed that the plaintiff ________ *[name of plaintiff (who will be spouse of injured party)]* has sued the defendant, ________ *[name of defendant]*, for loss of consortium as a result of injury to ________ *[name of plaintiff's spouse]*. Consortium is defined as the love, care and companionship given by one spouse to the other. For ________ *[name of plaintiff]* to recover damages on this claim, you must find by a preponderance of the evidence that:

a. The plaintiff's injured spouse is entitled to recover damages from ________ *[name of defendant]* for ________ *[his/her]* injuries; and

b. As a result of the injuries sustained by ________ *[name of plaintiff's injured spouse]*, ________ *[name of plaintiff]* sustained a loss of consortium.

II. You are further instructed that, should you find for ________ *[name of plaintiff]* on the question of liability as posed to you in section I above, you must then determine the amount of money which will reasonably and fairly compensate ________ *[him/her]* for the value of the consortium ________ *[he/she]* has lost, and for the value of the loss of consortium ________ *[he/she]* is reasonably certain to sustain as a result of ________ *[name of defendant]*'s actions.

In determining the amount of damages suffered by ________ *[name of plaintiff]* resulting from the injury to ________ *[his wife or her husband]*, you should consider the following elements of damage as have been proved by a preponderance of the evidence in this case:

a. The loss of society, companionship, love and affection;

b. The loss of aide, services, and physical assistance provided by the ________ *[wife or husband]*;

c. The loss of sexual relations; and

d. The loss of participation together in the activities, duties and responsibilities of making a home.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 93-3-1.

Miss. Code Ann. § 11-1-60.

Harkins v. Paschall, 348 So. 2d 1019 (Miss. 1977).

The plaintiff's recovery in an action for loss of consortium is reduced by the relative percentage, if any, of the injured spouse's comparative negligence. Choctaw, Inc. v. Wichner, 521 So. 2d 878 (Miss. 1988).

The Mississippi Supreme Court has declined to create a cognizable claim brought by a child for loss of parental consortium, leaving the creation of such an action to the legislature. Thompson v. Love, 661 So. 2d 1131 (Miss. 1995).

§ 10:22 Wrongful death—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, should you find for the plaintiff in this case, you may award such damages as you determine to be just, taking into consideration: (a) all the damages of every kind sustained by the decedent as a result of *[his/her]* death; and (b) all damages of every kind to any and all parties interested in the suit, who are the decedent's ________ *[here insert the relationship of the class of interested persons to the decedent].*

In establishing the amount of damages, you should consider each of the following elements as are shown by a preponderance of the evidence, if any, in this case:

A. DAMAGES SUSTAINED BY THE DECEDENT

1. The amount which the decedent would have earned from the date of *[his/her]* death up to the date of this trial, but for *[his/her]* death;

2. The present net cash value of the decedent's work life expectancy from the date of trial;

3. Any and all reasonable medical expenses necessarily incurred for health care rendered the decedent as a result of the occurrence;

4. The pain, suffering and mental anguish sustained by the decedent from the time of the occurrence until the time of *[his/her]* death;

5. Any and all reasonable funeral and burial expenses incurred for the burial and interment of the decedent;

6. Any and all reasonable expenses for property damage suffered by the decedent as a result of the occurrence;

7. Reasonable cost of administration of the decedent's estate.

B. DAMAGES SUSTAINED BY THE WRONGFUL DEATH BENEFICIARIES

Decedent's Surviving Spouse and/or Children:

1. The loss of society, companionship and services sustained by the decedent's *[widow/widower]* as a result of *[his/her]* death; and/or

2. The loss of the training and guidance of the decedent sustained by each of *[his/her]* minor children from the date of the decedent's death to the date each child attains the age of majority; and/or

3. The loss of society and companionship of the decedent sustained by each of *[his/her]* children from the date of the death of the decedent for the balance of *[his/her]* life expectancy.

Decedent's Surviving Parents and/or Siblings:

1. The loss of the society and companionship of the decedent sustained by *[his/her]* mother and father for the balance of their life expectancy; and/or

2. The loss of society and companionship of the decedent

sustained by each of *[his/her]* brothers and sisters for the balance of the life expectancy of the decedent.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-7-13 (Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit).

See Miss. Code Ann. § 11-1-69.

In Section B, the practitioner should choose the appropriate list of elements, depending on whether the decedent was survived by a spouse/children or parents/siblings. Logically, the beneficiary's recovery for loss of society, companionship, and services extends for the life expectancy of the decedent if the decedent is older than the beneficiary or for the balance of the beneficiary's life expectancy if the beneficiary is older than the decedent. The language of the instruction should be adjusted accordingly in each particular case. See Boyd Const. Co. v. Bilbro, 210 So. 2d 637, 643 (Miss. 1968).

§ 10:23 Wrongful death—Net cash value of decedent's work life expectancy—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the "present net cash value" of the decedent's work life expectancy is a present sum of money which, when invested at what you find from a preponderance of the evidence to be a fair and reasonable rate of interest, would provide a flow of income equal to the amount that the decedent would have reasonably been expected to earn from the time of trial for the balance of his/her work life expectancy. From that sum, you must subtract the present cash value of the amount which the decedent would reasonably have spent on his/her own personal living expenses.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-7-13.

The foregoing adjustment to the present net cash value of the decedent's work life expectancy must be made in order that the decedent not be "more valuable to his family dead than alive." Sheffield v. Sheffield, 405 So. 2d 1314 (Miss. 1981)(citing Louisville & N.R. Co. v. Garnett, 129 Miss. 795, 93 So. 241 (1922)). The deduction for the decedent's living expenses under *Sheffield* has also been interpreted to include a deduction for the amount of income taxes for which the decedent would have been responsible. Smith v. Industrial Constructors, Inc., 783 F.2d 1249 (5th Cir. 1986).

§ 10:24 Wrongful death—Net cash value of decedent's work life expectancy—Factors

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In considering the amount of your verdict, if any, to be awarded for the present net cash value of the work life expectancy of the decedent, you may take into consideration future changes in the cost of living and the purchasing power of money.

NOTES TO FORM

Practice Notes

Holmes County Bank and Trust Co. v. Staple Cotton Co-op. Ass'n, 495 So. 2d 447, 451 (Miss. 1986); Jesco, Inc. v. Shannon, 451 So. 2d 694, 704 (Miss. 1984); Kinnard v. Martin, 223 So. 2d 300, 302 (Miss. 1969).

§ 10:25 Wrongful death—Determination of life expectancy

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The decedent would have been ________ years of age at the time of *[his/her]* death and had a life expectancy of ________ years. ________ *[[His/Her] mother was ________ years of age and has a life expectancy of ________ years; [his/her] father was ________ years of age and has a life expectancy of ________ years; [his/her] [brother/sister] ________, was ________ years of age and has a life expectancy of ________ years; ________.]* These figures are to assist you in determining the present net cash value of the decedent's work life expectancy, the value of the loss of enjoyment of life sustained by the decedent and the amount of damages, if any, to be awarded to the survivors for the damages sustained by them as a result of the decedent's death.

§ 10:26 Mortality tables

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

According to life expectancy tables, the life expectancy of *[name of decedent]* is *[number of years]* years. This figure is to assist you in determining the probable life expectancy of *[name of decedent]*. It is not conclusive and you are not bound by it. It is only an estimate based on average experience. You may consider this figure if you believe that *[name of decedent]* was in good health at the time of the accident and that *[his/her]* occupation was neither extra-hazardous nor likely to impair *[his/her]* health. You may find that *[name of decedent]* probably would have lived a longer or shorter period than *[number of years]* years.

NOTES TO FORM

Practice Notes

Churchill v. Pearl River Basin Development Dist., 757 So. 2d 940 (Miss. 1999) (use of the life expectancy figures in wrongful death context).

Tucker v. Gurley, 179 Miss. 412, 176 So. 279 (1937); Vicksburg R., Power & Mfg. Co. v. White, 82 Miss. 468, 34 So. 331 (1903).

Research References

West's Key Number Digest
Evidence ⚷364

Legal Encyclopedias
Am. Jur. 2d, Death § 334
C.J.S., Evidence § 1264

§ 10:27 Wrongful death—Form of verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, should you find for the plaintiff(s), your verdict must be in separate and distinct parts and should be stated as follows:

"We the jury find for the plaintiff ________ *[name(s) of plaintiff(s)]* and award damages for loss of society and companionship, pain and suffering and present net cash value of the life of the deceased in the sum of $________.

We the jury find for the plaintiff ________ *[name(s) of plaintiff(s)]* and award damages for medical expenses, funeral expenses and damage to personal property in the sum of $________."

If you find from a preponderance of the evidence that the plaintiff is entitled to punitive damages, you should return the following additional verdict:

"We the jury award the survivors punitive damages in the amount of $________."

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-7-13.

McGowan v. Estate of Wright, 524 So. 2d 308, 311 (Miss. 1988) (listing four general areas of recovery in wrongful death cases); Thornton v. Insurance Co. of North America, 287 So. 2d 262 (Miss. 1973).

This form of the verdict is required by Thornton v. Insurance Co. of North America, 287 So. 2d 262, 267 (Miss. 1973). Under *Thornton*, the cause of action may likewise be separated, in certain circumstances, into a recovery for direct expenses and property damages and a recovery for nonpecuniary losses under the wrongful death statute, such as loss of the decedent's society, companionship and services. See also Alexander v. Elzie, 621 So. 2d 909, 912 (Miss. 1992); McDonald v. Southeastern Fidelity Ins. Co., 606 So. 2d 1061, 1064-65 (Miss. 1992).

§ 10:28 Personal property capable of being repaired

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff in this case, you are instructed that in awarding damages to plaintiff for harm to *[his/her/its]* personal property, if any, you should consider the difference between the reasonable market value of the property immediately before and immediately after it was damaged, as shown by a preponderance of the evidence.

However, if the property can be restored to its reasonable market value by being repaired, the plaintiff is entitled to recover the reasonable cost of repairing the property. You are reminded that the law only entitles plaintiff to recover the amount required to put the property in the condition as it was at the time it was injured or damaged, no more and no less. Therefore, if you find from a preponderance of the evidence that the property after it is repaired will be worth more than it was in its condition at the time of the injury, then plaintiff's recovery is limited to those reasonable costs of restoring the property to its reasonable market value before it was damaged, not to its improved condition. On the other hand, if you find from a preponderance of the evidence that the property, as repaired, will be worth less than it was at the time of the injury, you should, in addition to the costs of repair, add an amount which fairly reflects the difference in the market value of the property after reasonable repairs have been made. Your award to the plaintiff, however, cannot exceed the difference between the reasonable market value of the property before it was damaged and the reasonable market value of the property after it was damaged, regardless of the cost to repair the property.

NOTES TO FORM

Practice Notes

Harper v. Hudson, 418 So. 2d 54 (Miss. 1982); Calvert Fire Ins. Co. v. Newman, 240 Miss. 10, 124 So. 2d 686 (1960); Potomac Ins. Co. v. Wilkinson, 213 Miss. 520, 57 So. 2d 158, 43 A.L.R.2d 321 (1952).

§ 10:29 Personal property capable of being repaired—Cost of repairs

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff in this case, you may award ________ *[him/her]* a reasonable amount of money to compensate ________ *[him/her]* for the damage to ________ *[name or describe plaintiff's personal property]*, as shown by a preponderance of the evidence. If you find that the ________ *[name or describe personal property]* can be restored to its previous functional use, you should consider: (a) the cost of repairs; and (b) the depreciation, if any, following repairs.

If repairs to the personal property will make it worth the same as it was before the damage, the plaintiff is entitled to only the reasonable cost of repairs.

If the personal property will be worth less after repairs are made than it was before the damage, the plaintiff is entitled to the reasonable cost of repairs, plus the difference between the property's value prior to the damage and its value subsequent to the repairs.

NOTES TO FORM

Practice Notes

Bell v. First Columbus Nat. Bank, 493 So. 2d 964 (Miss. 1986); Thomas v. Global Boat Builders & Repairmen Inc., 482 So. 2d 1112 (Miss. 1986); Harper v. Hudson, 418 So. 2d 54 (Miss. 1982).

This instruction is provided as an alternate form to Mississippi Civil Jury Instruction § 10:30, which measures damages under the "before-and-after rule." For years, the general rule of recovery for a repairable injury to personal property had been simply the cost of repairs. Teledyne Exploration Co. v. Dickerson, 253 So. 2d 817 (Miss. 1971). The Mississippi Supreme Court then announced what became known as the "before-and-after rule" as set forth in Harper v. Hudson, 418 So. 2d 54, 57 (Miss. 1982), which set the measure of damages as the difference in the value of the property immediately before the casualty or loss and the value immediately after the damage or injury to the property. The two standards were then addressed in Thomas v. Global Boat Builders & Repairmen Inc., 482 So. 2d 1112 (Miss. 1986), wherein the Mississippi Supreme Court set forth two elements to be considered in assessing an award for repairable damages to personal property: (1) the cost of repairs; and (2) depreciation, if any following repairs. This alternate instruction enunciates the newer "cost of repairs plus depreciation standard." Regardless of whether the test employed is the "before-and-after rule" or the "cost of repairs plus depreciation standard," the result should be the same. Bell v. First Columbus Nat. Bank, 493 So. 2d 964 (Miss. 1986).

§ 10:30 Personal property damaged beyond repair

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that if you find by a preponderance of the evidence in this case that ________ *[name or description of plaintiff's personal property]* was damaged beyond repair, you may award the plaintiff, ________ *[name of plaintiff]*, a sum of money which fairly represents the difference between the reasonable market value of the property before the damage and the reasonable market value of the property, if any, of what remains of the property after the damage. If the property is totally destroyed and rendered absolutely valueless in the accident or casualty, you may award plaintiff a sum of money which fairly represents the value of the property at the time of its destruction.

NOTES TO FORM

Practice Notes

Bell v. First Columbus Nat. Bank, 493 So. 2d 964 (Miss. 1986); Thomas v. Global Boat Builders & Repairmen Inc., 482 So. 2d 1112 (Miss. 1986); Harper v. Hudson, 418 So. 2d 54 (Miss. 1982); Gilbert v. Crosby, 160 Miss. 711, 135 So. 201 (1931); Greenwald v. Yazoo & M.V.R. Co., 115 Miss. 598, 76 So. 557 (1917).

§ 10:31 Recovery for tortious damage—Loss of use of property

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff in this case, then in addition to the cost to repair the property damaged, you may include in your verdict the fair rental value of a substitute of like nature and performance for a reasonable time necessary to make the repairs to the property, or the amount which plaintiff actually paid for such reasonable rental, whichever is less.

NOTES TO FORM

Practice Notes

Where property is totally destroyed, there can be no recovery for loss of use. Long v. Magnolia Hotel Co., 236 Miss. 655, 114 So. 2d 667 (1959), suggestion of error sustained, 236 Miss. 655, 114 So. 2d 667 (1959).

Where a business or commercial vehicle is involved and no substitute vehicle can be rented in the market and area related to plaintiff's business and trade area, loss of profits may be recovered where the loss of profits can be proved with reasonable certainty. National Dairy Products Corp. v. Jumper, 241 Miss. 339, 130 So. 2d 922 (1961). See also McKinney v. Grace Distribution Services, Inc., 660 F. Supp. 1092 (S.D. Miss. 1986); First Nat. Bank of Jackson v. Olive, 330 So. 2d 568 (Miss. 1976).

Pelican Trucking Co. v. Rossetti, 251 Miss. 37, 167 So. 2d 924 (1964), suggestion of sustained in part, overruled in part, 251 Miss. 37, 170 So. 2d 573 (1965); National Dairy Products Corp. v. Jumper, 241 Miss. 339, 130 So. 2d 922 (1961).

§ 10:32 Personal property having no market value

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that ordinarily, when damages are to be awarded to the plaintiff for injuries to or destruction of personal property, then you should be guided by testimony as to the market value of the property involved. However, should you find in this case that you cannot value the property by using this guideline, then you may consider that loss in terms of the actual value of the property to the plaintiff, but not the sentimental value which the plaintiff places on the property. To arrive at an amount, you may consider such matters as the initial cost of the property to the plaintiff, the length of time the plaintiff had used the item, the condition of the property at the time of its loss, the length of time and amount of effort and skill required to reproduce the property, the particular purposes for which the plaintiff required the property, and the cost of replacing the property with property of a similar kind and condition.

NOTES TO FORM

Practice Notes

If the property is not totally destroyed, then the plaintiff should be allowed to recover the diminution in value of the property. This may be measured by the reasonable cost to repair the property to restore it to the condition it was in before it was damaged, so long as the cost of repairs does not exceed the reasonable value of the property.

Lititz Mut. Ins. Co. v. Buckley, 261 So. 2d 492 (Miss. 1972) (clothing); McManus v. Temple, 195 So. 2d 830 (Miss. 1967) (clothing); Austin v. Millspaugh & Co., 90 Miss. 354, 43 So. 305 (1907) (architect's drawings); Louisville & N. R. Co. v. Stewart, 78 Miss. 600, 29 So. 394 (1901) (portraits); Hodges v. Causey, 77 Miss. 353, 26 So. 945 (1900) (pet).

§ 10:33 Injury to real property—Definition of fair market value

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the term "fair market value" as used in these instructions means the price land would bring if it were offered for sale in the open market by a seller who is not under an obligation to sell, for a price paid by someone who is not under an obligation to buy the land, and where the buyer and seller have reasonable knowledge of the material facts concerning the property. You are further instructed that if you find for the plaintiff in this case, then in determining the proper measure of damages to be awarded to the plaintiff, if any, you should subtract the fair market value of plaintiff's land remaining after ________ *[the taking or suffering the injury complained of]*, from the fair market value of the whole tract of land immediately prior to ________ *[the taking or suffering the injury in question]*. You may not consider any benefits or injuries which are shared by the general public as a result of the use to which the land ________ *[taken or damaged]* is to be put.

NOTES TO FORM

Practice Notes

Miss. Code Ann. §§ 11-27-21 and 11-27-23.

Mississippi Transp. Com'n v. Bridgforth, 709 So. 2d 430 (Miss. 1998); Anderson v. Guy, 488 So. 2d 782 (Miss. 1986); Coleman v. Mississippi State Highway Commission, 289 So. 2d 918 (Miss. 1974); Mississippi Val. Gas Co. v. Boydstun, 230 Miss. 11, 92 So. 2d 334 (1957); Mississippi State Highway Commission v. Hillman, 189 Miss. 850, 198 So. 565 (1940).

No independent damages payable for damage to aesthetics. Mississippi State Highway Com'n v. Viverette, 529 So. 2d 896 (Miss. 1988).

In some cases, cost of reproduction of improvements to real property may be considered in arriving at fair market value of property. Mississippi State Highway Commission v. Owen, 308 So. 2d 228 (Miss. 1975), judgment corrected, 310 So. 2d 920 (Miss. 1975).

§ 10:34 Injury to real property—When eminent domain proceeding dismissed

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff in this case, then you may consider the following elements in assessing the proper measure of ________ *[the landowner's]* damages, as has been shown by a preponderance of the evidence in this case:

1. All reasonable expenses incurred in defending the suit, such as attorney's fees, loss of ________ *[the landowner's]* time, and reasonable expenses incurred by ________ *[the landowner]* in helping to prepare this case;
2. ________ *[The difference between the market value of the property from the date the eminent domain proceedings were begun to the date that the proceedings were dropped, unless the property can be restored for a lesser amount by the reasonable cost of repairs, under which circumstances you should award the reasonable cost of such repairs to the property;]*
3. The reasonable rental or usable value of the property for the period of time plaintiff was deprived of the use of the land.

NOTES TO FORM

Practice Notes

This instruction is to be used when eminent domain proceedings are begun, but then are dismissed. Subsection 2 above would be applicable only if the property was damaged between the time the proceedings were begun and the time the proceedings were dropped, or if the land, during such period, suffers a diminution in value.

Miss. Code Ann. § 11-27-37.

Mississippi State Highway Commission v. Morgan, 254 Miss. 630, 181 So. 2d 905 (1966); City of Jackson v. Lee, 234 Miss. 502, 106 So. 2d 892 (1958).

§ 10:35 Injury to real property—Elements to consider

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff in this case, then you are instructed that, in determining the damages you should award for the injury to plaintiff's ________ *[land or buildings]*, you should consider the difference between the market value of plaintiff's property before the injury and the value after the harm was done. However, should a preponderance of the evidence show that plaintiff's property can be restored to its condition before the injury, then you should award as compensation that sum which reflects the reasonable cost to repair plaintiff's property, unless the cost of such repairs would be greater than the market value of the property before the injury. If the preponderance of the evidence shows that the reasonable cost of repairs would exceed the market value of the property before the injury, then you are instructed that, in awarding damages to the plaintiff, you should consider the difference between the market value of the property before the injury and the market value of the property after the harm was done.

NOTES TO FORM

Practice Notes

City of Jackson v. Keane, 502 So. 2d 1185 (Miss. 1987); Teledyne Exploration Co. v. Dickerson, 253 So. 2d 817 (Miss. 1971); Bynum v. Mandrel Industries, Inc., 241 So. 2d 629 (Miss. 1970).

§ 10:36 Injury to real property—Consideration of rental value

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff in this case, and should you further find, from a preponderance of the evidence in this case, that the plaintiff was ________ *[deprived or partially deprived]* of the use of *[his/her/its]* land, then in determining damages to be awarded to the plaintiff, you may consider what would be appropriate compensation for the rental or usable value of the property for the period of time the plaintiff was deprived of the use of the land.

NOTES TO FORM

Practice Notes

Plaintiff may also recover special damages, such as annoyance, discomfort, inconvenience and sickness. City of Jackson v. Keane, 502 So. 2d 1185, 1187 (Miss. 1987).

If the injuries to the property are not permanent, and the owner takes reasonable measures to prevent further injury, he or she is entitled to recover, as an element of his or her damages, the reasonable cost of mitigating his or her damages.

City of Jackson v. Keane, 502 So. 2d 1185, 1187-88 (Miss. 1987). See also Restatement Second, Torts § 931.

§ 10:37 Injury to property—Wrongful attachment

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find, in accordance with the instructions given to you by the Court, that the defendant wrongfully attached the property of the plaintiff, then your determination of damages, if you award any to plaintiff, should be based upon the following elements as have been proved by a preponderance of the evidence:

1. The reasonable costs of rental of like or similar property for the period of the attachment;
2. All reasonable costs of defending the attachment, including all reasonable costs of defending the suit and reasonable attorneys' fees, and all reasonable costs incurred by plaintiff in securing the restoration of the property to plaintiff;
3. If the property itself was damaged during the period of the attachment, the difference between the market value of plaintiff's property before the attachment and the value after the harm was done, or the reasonable cost of repairs to restore the property, whichever is less.

§ 10:38 Injury to property—Wrongful replevin

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The Court instructs the jury that the unsuccessful party in a replevin suit is liable to the successful party for damages which have been incurred by the successful party. Therefore, the successful party in this case, be it the plaintiff or the defendant, is entitled to recover the following damages which have been proved by a preponderance of the evidence:

(1) ________ *[The difference between the market value of the property from the date property was taken to the date of the return of the property, unless the property can be restored for a lesser amount by the reasonable cost of repairs, under which circumstances you should award the reasonable cost of such repairs to the property;]* ________ *[If the property cannot be returned, the reasonable market value of the property at the time it was taken;]*

(2) The reasonable rental or usable value of the property for

the period of time the successful party was deprived of the use of the property; and

(3) Such necessary and reasonable expenses as were incurred by the successful party as a proximate result of the taking.

NOTES TO FORM

Practice Notes

Miss. Code Ann. §§ 11-37-115 to 11-37-121, 11-37-123, 11-37-139, 11-37-141, 11-37-149.

Standard Finance Corp. v. Breland, 249 Miss. 413, 163 So. 2d 232 (1964); Cook v. Waldrop, 160 Miss. 862, 133 So. 894 (1931).

§ 10:39 Form of verdict—Eminent domain

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When nine of you agree on the verdict, it will be brought back in the following form: "We the jury, find the defendant ______ *[name]* will be damaged by the acquisition of *[his/her]* property for public use in the sum of ______ dollars."

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-27-23. See M.R.C.P. 48.

Lennep v. Mississippi State Highway Commission, 347 So. 2d 341 (Miss. 1977) (jury can apportion damages among several defendants).

Research References

West's Key Number Digest
Trial ⚷217

Legal Encyclopedias
C.J.S., Trial §§ 298, 320, 322

§ 10:40 Breach of contract—Nominal damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Should you find for the plaintiff, but further find, from a preponderance of the evidence, that the defendant's breach of contract did not cause plaintiff any actual loss or that the extent of plaintiff's damages cannot be proved to a reasonable degree of probability, then you may return a reward of nominal damages.

NOTES TO FORM

Practice Notes

Callicott v. Gresham, 249 Miss. 103, 161 So. 2d 183 (1964); B. Bluethenthal Co. v. McDougal, 163 Miss. 406, 142 So. 13 (1932).

Research References

Model Codes and Restatements

Restatement First, Contracts § 328

§ 10:41 Breach of contract—Actual damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find for the plaintiff, you should award damages in an amount that will put ________ *[plaintiff]* in as good a position as *[he/she]* would have been had ________ *[defendant]* not failed to fulfill his/her part of the contract.

You can consider the losses incurred and the gains not realized due to ________ *[defendant's]* failure if *[he/she]* knew or had reason to foresee at the time the contract was made that failure to fulfill the contract would probably cause such losses and/or damages to ________ *[plaintiff]*.

Any expenses which ________ *[defendant's]* failure to perform saved should be deducted from the amount awarded.

Additionally, any losses and/or damages that ________ *[plaintiff]* could have foreseen and avoided through reasonable efforts should be deducted from the amount awarded.

NOTES TO FORM

Practice Notes

Business Communications, Inc. v. Banks, 90 So. 3d 1221, 1225 (Miss. 2012) (Monetary damages are a remedy for, not an element of, breach of contract).

Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176 (N.D. Miss. 1970); McDaniel Bros. Const. Co. v. Jordy, 195 So. 2d 922 (Miss. 1967); 5 Corbin on Contracts §§ 1002, 1007, 1014, 1038 to 1044 (1964); Restatement First, Contracts §§ 329, 330, 335, 336(1) (1932).

This instruction is in general terms. Before being granted, the facts of the case must be incorporated into this instruction.

See Miss. Code Ann. §§ 75-2-706, 75-2-708 to 75-2-710 (seller's remedies for buyer's breach); Miss. Code Ann. §§ 75-2-711 to 75-2-715 (buyer's remedies for seller's breach).

Research References

West's Key Number Digest

Damages ⚷117 et seq., 218

Legal Encyclopedias

C.J.S., Damages §§ 73 to 79, 187

Land

Practice Notes

Tansil v. Horlock, 204 So. 2d 457 (Miss. 1967).

Research References

Additional References

5 Corbin on Contracts §§ 1098, 1098(a) (1964)

Employment

Practice Notes

B. Bluethenthal Co. v. McDougal, 163 Miss. 406, 141 So. 291 (1932).

Research References

Legal Encyclopedias

Am. Jur. 2d, Damages §§ 70, 74

Additional References

Corbin on Contracts §§ 1095, 1096 (1964)

Construction

Practice Notes

Tansil v. Horlock, 204 So. 2d 457 (Miss. 1967).

Research References

Additional References
5 Corbin on Contracts §§ 1089, 1094 (1964)

Chapter 11

Libel and Slander

§ 11:1 Actionable words
§ 11:2 Defamation—Definition
§ 11:3 Slander or libel per se
§ 11:4 Slander or libel per quod
§ 11:5 Absolute privilege
§ 11:6 Qualified or conditional privilege
§ 11:7 Defamation of a public figure—Malice required

Research References

West's Key Number Digest

Libel and Slander 🔑1 to 162

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 274
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 11:1 Actionable words

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. The defendant, ________, spoke ________ *[state insulting words]*; and
2. These words are considered to be insults from their usual construction and common acceptance; and
3. The defendant communicated these words to the plaintiff, ________; and
4. A reasonable person would believe that such words would lead to a breach of the peace;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 95-1-1
Isaacks v. Reed, 537 So. 2d 409 (Miss. 1988).

§ 11:2 Defamation—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Defamatory words are those which tend to injure one's reputation, and thereby expose *[him / her]* to public hatred, contempt or ridicule, degrade *[him / her]* in society, lessen *[him / her]* in public esteem or lower *[him / her]* in the confidence of the community.

NOTES TO FORM

Practice Notes

Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238 (5th Cir. 1980); Chatham v. Gulf Pub. Co., Inc., 502 So. 2d 647 (Miss. 1987); Fulton v. Mississippi Publishers Corp., 498 So. 2d 1215 (Miss. 1986); Ferguson v. Watkins, 448 So. 2d 271 (Miss. 1984); Smith v. Byrd, 225 Miss. 331, 83 So. 2d 172 (1955).

§ 11:3 Slander or libel per se

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that the defendant told a third person either orally or in writing that:

1. *[Specification of words published by defendant]*, or substantially similar words, and
2. These words accused the plaintiff of:
    a. Committing a major crime; or
    b. Having a loathsome disease; or
    c. Being unchaste or promiscuous; or
    d. Engaging in conduct which will harm plaintiff in *[his/her]* business, trade, profession or office; and
3. These words were false;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Chatham v. Gulf Pub. Co., Inc., 502 So. 2d 647 (Miss. 1987); Smith v. Byrd, 225 Miss. 331, 83 So. 2d 172 (1955).

§ 11:4 Slander or libel per quod

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. The defendant *[spoke/wrote]* the following words: *[specification of exact or synonymous allegedly defamatory words]*, which words were false; and
2. These words were *[spoken/written]* with the intent to injure the reputation of the plaintiff or in reckless disregard of such consequences; and
3. These words were communicated to another party; and
4. The said party reasonably understood these words to be harmful to the plaintiff's reputation; and
5. The plaintiff's reputation was injured in that special damages were sustained; and
6. ________ *[Speaking or Writing]* of these words was the sole proximate cause or a proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Chatham v. Gulf Pub. Co., Inc., 502 So. 2d 647 (Miss. 1987); Fulton v. Mississippi Publishers Corp., 498 So. 2d 1215 (Miss. 1986).

§ 11:5 Absolute privilege

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An absolutely privileged communication is a communication which would be actionable as defamatory except that it was made in the interest of the public service or the due administration of justice and was reasonably relevant and pertinent thereto. It is a question of law whether an absolute privilege exists, but it is a question of fact whether the privilege has been exceeded.

If you find from a preponderance of the evidence in this case that the words ________ *[spoken or written]* by the defendant, whether defamatory or not, were reasonably pertinent and relevant to ________ *[type proceeding giving rise to the privilege]* then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Eason v. Federal Broadcasting Co., 697 So. 2d 435 (Miss. 1997) (defense of absolute privilege applies to legislative and judicial proceedings and other acts of state, including statements made in the discharge of a duty under express authority of law and will not apply to those parties with a qualified privilege; privilege will extend only to truthful statements, not inaccurate statements).

§ 11:6 Qualified or conditional privilege

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A conditional/qualified privileged communication is a communication which could be/is actionable as defamatory if the defendant made the statement with actual malice—that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not, while entertaining subjective doubt as the truth of the statement. It is a question of law whether a conditional/qualified privilege exists, but it is a question of fact whether the privilege has been exceeded/violated.

The court instructs you that the defendant/________ *[defendant]* had a conditional/qualified privilege to ________ *[type of action giving rise to the privilege]*. If you find by clear and convincing evidence that the words spoken by the defendant were made with actual malice, then your verdict shall be for the plaintiff.

NOTES TO FORM

Practice Notes

Journal Pub. Co. v. McCullough, 743 So. 2d 352 (Miss. 1999) (discussing actual malice required for public figure's action against newspaper and stating burden of proof for actual malice is clear and convincing evidence); Eason v. Federal Broadcasting Co., 697 So. 2d 435 (Miss. 1997) (in action against media defendant, privilege will extend only to truthful statements, not inaccurate statements).

§ 11:7 Defamation of a public figure—Malice required

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find by clear and convincing evidence that a defamatory falsehood relating to the plaintiff as a ________ *[public figure or public official]* was ________ *[uttered or written]* by the defendant with knowledge that it was false or with reckless disregard of whether it was false, then your verdict shall be for the plaintiff.

NOTES TO FORM

Practice Notes

Johnson v. Delta-Democrat Pub. Co., 531 So. 2d 811 (Miss. 1988); Blake v. Gannett Co., Inc., 529 So. 2d 595 (Miss. 1988).

Chapter 12

Malicious Prosecution and False Imprisonment

§ 12:1 Malicious prosecution—Elements
§ 12:2 —General instruction
§ 12:3 False imprisonment—Elements
§ 12:4 —General instruction

Research References

West's Key Number Digest

Malicious Prosecution ⚷1 to 79

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 12:1 Malicious prosecution—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order to recover for malicious prosecution, the plaintiff must prove by a preponderance of the evidence:

(1) The institution or continuation of original judicial proceedings, either criminal or civil;

(2) By, or at the insistence of the defendant;

(3) The termination of such proceedings in the plaintiff's favor;

(4) Malice in instituting the proceedings;

(5) Want of probable cause for the proceedings; and

(6) The suffering of injury or damages as a result of the proceedings.

NOTES TO FORM

Practice Notes

Central Healthcare Services, P.A. v. Citizens Bank of Philadelphia, 12 So. 3d 1159, 1167 (Miss. Ct. App. 2009) (quoting Richard v. Supervalu, Inc., 974 So. 2d 944, 948–49 (Miss. Ct. App. 2008)).

Malicious prosecution and false arrest are two separate and distinct causes of action which are comprised of completely different elements. Parker v. Mississippi Game and Fish Com'n, 555 So. 2d 725, 732 (Miss. 1989).

§ 12:2 Malicious prosecution—General instruction

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. The defendant instituted a criminal or civil proceeding against the plaintiff; and
2. The defendant did not have an honest belief based upon reasonable grounds that the plaintiff had committed the crime for which *[he/she]* was prosecuted; and
3. The defendant instituted the proceeding primarily for a purpose other than bringing the plaintiff to justice; and
4. The proceeding has terminated in the plaintiff's favor;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Welford v. Dickerson, 524 So. 2d 331 (Miss. 1988); Mississippi Road Supply Co., Inc. v. Zurich-American Ins. Co., 501 So. 2d 412 (Miss. 1987); Royal Oil Co., Inc. v. Wells, 500 So. 2d 439 (Miss. 1986); Woolfolk v. Tucker, 485 So. 2d 1039 (Miss. 1986); Torabi v. J.C. Penney, Inc., 438 So. 2d 1354 (Miss. 1983); Owens v. Kroger Co., 430 So. 2d 843 (Miss. 1983); Pugh v. Easterling, 367 So. 2d 935 (Miss. 1979); Masonite Corp. v. Baldwin, 365 So. 2d 641 (Miss. 1978).

Although the terms malice and malicious are not stated in the instruction, the meaning of malicious in this cause of action is a legal sense of the prosecution being instituted for a purpose other than that of bringing the offender to justice. Woolfolk v. Tucker, 485 So. 2d 1039 (Miss. 1986).

§ 12:3 False imprisonment—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order to recover for false imprisonment, the plaintiff must prove by a preponderance of the evidence:

(1) That the plaintiff was detained; and

(2) That the detention or imprisonment was unlawful.

The plaintiff must also show that the defendant personally and actively participated directly or through indirect procurement in the detention or imprisonment.

NOTES TO FORM

Practice Notes

Robinson v. Hill City Oil Co., Inc., 2 So. 3d 661, 667 (Miss. Ct. App. 2008).

§ 12:4 False imprisonment—General instruction

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. *[Name of plaintiff]* was detained at *[location of detention]*; and
2. That the defendant, *[name of defendant]*, proximately caused or contributed to the plaintiff being detained against *[his / her]* will, at *[location of detention]* by *[description of defendant's actions]*; and
3. If you further find that the plaintiff's detention was unlawful, considering the totality of the circumstances as to whether or not the actions of the defendant were objectively reasonable in their nature, purpose, extent and duration,

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Marchbanks v. Borum, 806 So. 2d 278, 287 (Miss. Ct. App. 2001). See Thornhill v. Wilson, 504 So. 2d 1205, 1208 (Miss. 1987).

Chapter 13

Professional Malpractice

§ 13:1 Lawyer—Duty owed to client
§ 13:2 Legal Malpractice—Elements
§ 13:3 Hospitals—General negligence instruction
§ 13:4 Physicians—General negligence instructions
§ 13:5 —Assumption of another specialty standard of care
§ 13:6 Informed consent
§ 13:7 Emergency treatment—Affirmative defense
§ 13:8 Special verdict form

Research References

West's Key Number Digest

Health 🔑115, 133, 201 to 223(2), 600 to 758

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 13:1 Lawyer—Duty owed to client

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A lawyer owes his or her client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated (or in this locality). Failure to do so constitutes negligent conduct on the part of the lawyer.

NOTES TO FORM

Practice Notes

Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440, 449 (Miss. 2006); Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1215 (Miss. 1996); Dean v. Conn, 419 So. 2d 148, 149 (Miss. 1982).

§ 13:2 Legal Malpractice—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order to recover for legal malpractice, the plaintiff must prove by a preponderance of the evidence that:

1. A lawyer-client relationship existed between the plaintiff *[plaintiff]* and the defendant *[defendant]*; and
2. The defendant was negligent in handling the plaintiff's legal affairs, which were entrusted to the defendant; and
3. As a proximate result of the defendant's negligence, the plaintiff was injured, that but for the defendant's negligence, the plaintiff would have been successful in *[his/her/its]* ________ *[state underlying case, claim, or defense].*

NOTES TO FORM

Practice Notes

Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440, 449 (Miss. 2006); Luvene v. Waldrup, 903 So. 2d 745, 747 (Miss. 2005).

Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440, 449 (Miss. 2006) (Simply stated, to show negligent conduct (breach of duty), the plaintiff must prove by a preponderance of the evidence that a reasonable prudent lawyer faced with the same circumstances would either have done something the defendant did not do, or would have refrained from doing something the defendant did.).

§ 13:3 Hospitals—General negligence instruction

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. The plaintiff was a patient in the defendant's hospital; and
2. While a patient in the hospital, the plaintiff was suffering from a mental and physical condition; and
3. The defendant should have reasonably been aware of the plaintiff's condition; and
4. The defendant failed to provide the care and attention that the patient's condition reasonably required in that it ________ *[describe claimed negligent act(s)]*; and
5. The defendant's failure to provide such care and attention was the sole proximate cause or proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe the plaintiff has failed to show any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Hardy v. Brantley, 471 So. 2d 358, 51 A.L.R.4th 205 (Miss. 1985).

§ 13:4 Physicians—General negligence instructions

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. Given the circumstances of the plaintiff at the time the defendant physician saw and treated the plaintiff, a minimally competent physician in the same field of practice and who had available the same general facilities, services, equipment and options as the defendant had during the time the plaintiff was *[his/her]* patient would have: ________ *[Here set forth the acts of commission and/or the omissions claimed]*; and
2. The defendant physician failed to comply with that standard of care in *[his/her]* treatment of the plaintiff; and
3. Such failure on the part of the defendant physician constituted a proximate cause or contributing proximate cause of ________ *[the ________ (injuries or death)]*;

then you must return a verdict for the plaintiff against the defendant physician.

However, if you believe from the evidence that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant physician.

NOTES TO FORM

Practice Notes

Bickham v. Grant, 861 So. 2d 299, 303 (Miss. 2003) (The appropriate standard of care in a medical malpractice case is objective and centers around exercising the degree of care, diligence, and skill ordinarily possessed and exercised by a minimally competent and reasonably diligent, skillful, careful, and prudent physician in that field of practice.).

See also Ladner v. Campbell, 515 So. 2d 882 (Miss. 1987).

§ 13:5 Physicians—Assumption of another specialty standard of care

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When a defendant tells a patient *[he/she]* can achieve a good result thereby claiming *[he/she]* possesses the skill necessary to perform the medical care involved, the standard of care to be applied in this case is that of a ________ *[general practice field]* rather than a physician having a specialty in ________ *[specialized practice field]*. Where a defendant admits that *[he/she]* did not possess the training or skill of a ________ *[specialized practice field]* but, nevertheless, undertook treatment of a complicated ________ *[illness/pregnancy]* which requires special skill and training not possessed by the defendant, the defendant must be held to the standard of care exercised in the field in which *[he/she]* has assumed/claimed to be qualified.

NOTES TO FORM

Practice Notes

This instruction should be given only where the evidence shows an admission by the physician that he/she does not have the special training to treat a complicated illness or injury but then nevertheless proceeds to provide treatment to the patient for such complicated illness or injury. See Adkins v. Sanders, 871 So. 2d 732, 740 (Miss. 2004) ([The doctor] should not be held to a standard of care required of a rheumatologist simply because he knew about [the patient]'s lupus when he undertook to treat her during her pregnancy as her obstetrician. His knowledge of a potential lupus flare does not result in his assumption of the rheumatologist's duties; nor does it raise the standard of care expected of [the doctor] to that of such a specialist. We find that Plaintiff's instruction P-21 is unsupported by evidence and is inappropriate under the law. Therefore, the trial court properly refused this instruction. . . .).

See also Lewis v. Soriano, 374 So. 2d 829 (Miss. 1979).

§ 13:6 Informed consent

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence that:

1. The defendant treated or operated upon the plaintiff by ________ *[set forth treatment alleged to have been rendered]*; and
2. The defendant physician did so without:
   a. First warning the plaintiff that the proposed treatment involved the following risk ________ *[describe the risk]* of the proposed treatment or surgery; and then
   b. Obtaining the plaintiff's express or implied consent; and
3. A minimally competent physician practicing in the same field of practice or specialty as the defendant physician would have warned the plaintiff of the risk of the proposed treatment of surgery; and
4. The said risk would have been material to a prudent patient in determining whether or not to undergo the treatment or surgery; and
5. The unauthorized treatment or surgery was the sole proximate cause or proximate contributing cause of the plaintiff's injury;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant physician.

NOTES TO FORM

Practice Notes

Latham v. Hayes, 495 So. 2d 453 (Miss. 1986); Marshall v. The Clinic for Women, P.A., 490 So. 2d 861 (Miss. 1986); Cole v. Wiggins, 487 So. 2d 203 (Miss. 1986); Reikes v. Martin, 471 So. 2d 385 (Miss. 1985).

§ 13:7 Emergency treatment—Affirmative defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

No duly licensed, practicing physician, physician assistant, dentist, registered nurse, licensed practical nurse, certified registered emergency medical technician, or any other person who, in good faith and in the exercise of reasonable care, renders emergency care to any injured person at the scene of an emergency, or in transporting said injured person to a point where medical assistance can be reasonably expected, shall be liable for any civil damages as a result of any acts committed in good faith and in the exercise of reasonable care, or omissions in good faith and in the exercise of reasonable care by such persons in rendering the emergency care to said injured person.

If you find from a preponderance of the evidence in this case that:

1. ________ *[Plaintiff]*, was injured to an extent that emergency care was required; and
2. ________ *[Defendant]*, gave the plaintiff emergency care:
    a. At the scene of the emergency; or
    b. In transporting *[him/her]* to a place where medical assistance could reasonably be expected; and
3. The defendant gave this care in good faith and in the exercise of reasonable care;

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 73-25-37.

Research References

West's Key Number Digest
Health 🔑800 to 835

Legal Encyclopedias
C.J.S., Physicians, Surgeons and other Health-Care Providers §§ 123 to 141

§ 13:8 Special verdict form

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

We, the jury in the above entitled action, find the following special verdict on the questions submitted to us:

Question No. 1: ________ *[Was or Were]* ________ *[any of]* the defendant(s) negligent in the ________ *[medical or hospital or nursing or diagnosis]* care and treatment of plaintiff?

Answer "yes" or "no" after the name of ________ *[the or each]* defendant.

		YES	NO
Answers:	________ *[Defendant]*	____	____
	________ *[Defendant]*	____	____
	________ *[Defendant]*	____	____

If you answer Question No. 1 "no" as to each defendant, you need not continue. If you answer Question No. 1 "yes" as to any defendant, then answer Question No. 2 as to each such defendant.

Question No. 2: ________ *[As to each defendant that you answered "yes" in response to Question No. 1]*, was such negligence a proximate cause of injury to the plaintiff?

Answer "yes" or "no" after the name of each such defendant.

		YES	NO
Answers:	________ *[Defendant]*	____	____
	________ *[Defendant]*	____	____
	________ *[Defendant]*	____	____

If you answer Question No. 2 “no” as to all defendants, you need not continue. If you answer Question No. 2 “yes” as to any defendant, then you are to award damages to the plaintiff from each such defendant in accordance with the damage instructions.

Chapter 14

Negligence

§ 14:1 Definition
§ 14:2 Proximate cause
§ 14:3 —Foreseeability
§ 14:4 —Causal connection
§ 14:5 —Concurrent cause
§ 14:6 —Factors relieving liability—Superseding cause
§ 14:7 Factors relieving liability—Acts of God
§ 14:8 Comparative negligence—Effect on damages compensation
§ 14:9 Assumption of risk
§ 14:10 Comparative negligence with counterclaim—Method for computing damages
§ 14:11 Strict liability for ultra-hazardous activities
§ 14:12 Parental liability for malicious and willful acts of children
§ 14:13 Standard of care for protection of children—General—Motor vehicle operators
§ 14:14 No inference from occurrence of accident
§ 14:15 Other party's conduct
§ 14:16 Duty of volunteers

Research References

West's Key Number Digest

Negligence 🔑200 to 1750

Legal Encyclopedias

Am. Jur. 2d, Parent and Child §§ 116 to 124

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Proof of Negligence in a Turning Accident or Jackknifing of a Truck, 66 Am. Jur. Proof of Facts 3d 379
Proof of Negligence Causing Snowmobile Accident and Resulting Injuries, 62 Am. Jur. Proof of Facts 3d 447
Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

Forms

Am. Jur. Pleading and Practice Forms, Torts §§ 4 to 32

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§ 14:1 Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances, or in failing to do something that a reasonably careful person would do under like or similar circumstances.

NOTES TO FORM

Practice Notes

Vaughn v. Ambrosino, 883 So. 2d 1167 (Miss. 2004).

§ 14:2 Proximate cause

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the defendant is not liable for all injuries that flow from ________ *[[his/her/its] negligence, if any or [his/her/its] wrongful act, if any or [his/her/its] chargeable conduct at issue in this suit]*, but only for those that could have been reasonably foreseen and anticipated. The injuries suffered by plaintiff must result from a chain of a natural and unbroken sequence from defendant's ________ *[chargeable, wrongful or negligent]* act. However, the defendant is not liable for damages which are remote or collateral, or which result from a remote, improbable or extraordinary occurrence, although such occurrence is within the range of possibilities flowing from defendant's ________ *[chargeable, wrongful or negligent]* act.

NOTES TO FORM

Practice Notes

Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 475-76 (Miss. 2010) (discussing instruction Mississippi Civil Jury Instruction § 14:2); Dillon v. Greenbriar Digging Service, Ltd., 919 So. 2d 172 (Miss. Ct. App.. 2005) (jury instruction correctly states the law of Mississippi regarding proximate cause); Marshall Durbin, Inc. v. Tew, 362 So. 2d 601 (Miss. 1978); Meridian Star v. Kay, 207 Miss. 78, 41 So. 2d 30, 10 A.L.R.2d 677 (1949).

§ 14:3 Proximate cause—Foreseeability

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An element or test of proximate cause is that an ordinarily prudent person should reasonably have foreseen that some injury might probably occur as a result of *[his/her/its]* negligence. It is not necessary to foresee the particular injury, the particular manner of the injury, or the extent of the injury.

NOTES TO FORM

Practice Notes

Marshall Durbin, Inc. v. Tew, 362 So. 2d 601 (Miss. 1978); Scoggins v. Vicksburg Hospital, Inc., 229 Miss. 770, 91 So. 2d 837, 70 A.L.R.2d 368 (1957); Kirkland v. Harrison, 221 Miss. 714, 74 So. 2d 820 (1954).

§ 14:4 Proximate cause—Causal connection

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order to be a proximate cause, the negligence of defendant must be a substantial factor in producing plaintiff's injury. If the plaintiff would have been injured even if the defendant had not been negligent, the defendant's negligence is not a substantial factor and not a proximate cause.

NOTES TO FORM

Practice Notes

City of New Albany v. Barkley, 510 So. 2d 805 (Miss. 1987); McRee v. Raney, 493 So. 2d 1299 (Miss. 1986); Barkley v. Miller Transporters, Inc., 450 So. 2d 416 (Miss. 1984); Mayberry v. Pearl River Farmers Co-op., A.A.L., 362 So. 2d 192 (Miss. 1978); Milam v. Gulf, Mobile & O.R. Co., 284 So. 2d 309 (Miss. 1973).

§ 14:5 Proximate cause—Concurrent cause

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find that defendant was negligent, it is not necessary that the defendant's negligence be the sole cause of plaintiff's injury. Concurrent cause is an act which combines with the original negligence of the defendant to produce an injury to the plaintiff. If the original act of the defendant is still operating and the injury is not different in kind from that which would have resulted from the original negligence, both the one who was originally negligent and the one whose act combined to produce the injury are liable to plaintiff. Thus, if you find from a preponderance of the evidence in this case that the injuries to the plaintiff proximately resulted from a negligent act of one defendant, ________ *[here identify the first defendant and recite the facts alleged as constituting negligence]*, in combination with ________ *[here state the alleged intervening cause or act of the second defendant]*, then both defendants are liable to the plaintiff, and your verdict shall be for the plaintiff against them both.

NOTES TO FORM

Practice Notes

Clark v. City of Pascagoula, 507 So. 2d 70 (Miss. 1987); Holmes v. T. M. Strider & Co., 186 Miss. 380, 189 So. 518, 123 A.L.R. 1190 (1939); Solomon v. Continental Baking Co., 172 Miss. 388, 160 So. 732 (1935).

§ 14:6 Proximate cause—Factors relieving liability—Superseding cause

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A superseding cause is an independent and unforeseen act by a third *[person/party]* which follows the defendant's negligence and which is the substantial factor in causing the plaintiff's injuries. A superseding cause becomes the proximate cause for the plaintiff's injuries and the defendant's negligence is a remote cause for which *[he/she/its]* is not liable. Thus, if you find from a preponderance of the evidence in this case that the defendant was negligent ________ *[state the operative facts set forth as constituting defendant's alleged negligence]*, but that an independent and unforeseeable act by a third person ________ *[here state the operative facts alleged as a superseding cause]* followed defendant's negligent acts and was a substantial factor in causing the plaintiff's injuries, then defendant is not liable for the injuries proximately resulting from the superseding cause, and your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Byrd v. Stubbs, 190 So. 3d 26 (Miss. Ct. App. 2016) (noting that the superseding cause instruction found in the Mississippi Model Jury Instructions uses the phrase "a substantial factor").

See Eckman v. Moore, 876 So. 2d 975, 980 (Miss. 2004) (finding a similar instruction properly stated the law of superseding cause).

Prairie Livestock Co., Inc. v. Chandler, 325 So. 2d 908 (Miss. 1976).

§ 14:7 Factors relieving liability—Acts of God

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that plaintiff's injury was due directly and exclusively to natural causes, without human intervention, which could not have been prevented by the exercise of reasonable care and foresight, the occurrence is an act of God for which the defendant is not liable.

NOTES TO FORM

Practice Notes

City of Jackson v. Brummett, 224 Miss. 501, 80 So. 2d 827 (1955).

Research References

West's Key Number Digest

Negligence ⚷440(2)

Legal Encyclopedias

Am. Jur. 2d, Negligence § 16
C.J.S., Negligence § 236

Model Codes and Restatements

Restatement Second, Torts § 451 (1965)

§ 14:8 Comparative negligence—Effect on damages compensation

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________, defendant, was negligent; and
2. ________, plaintiff, was negligent; and
3. The negligence of both ________, defendant, and ________, plaintiff were proximate contributing causes of the accident in this case; and
4. ________, plaintiff, sustained injuries and damages caused by the combined negligence of ________, defendant, and ________, plaintiff;

then you will, in arriving at your verdict, first determine that sum of money which will fairly and adequately compensate ________, plaintiff for said injuries and damages, and then reduce this sum in proportion to the causal negligence of ________, plaintiff, using the following method:

1. Determine the proportion that ________, plaintiff's causal negligence bears to the causal negligence as a whole, as a part or percentage of 100 %= total causal negligence of both actors in case);
2. Multiply the sum of money you determined as plaintiff's damages by the percentage figure representing the proportion of ________, plaintiff's causal negligence;
3. Subtract the result of your multiplication from the sum you first determined to be ________, plaintiff's damages;
4. Return a verdict for that amount for ________, plaintiff.

NOTES TO FORM

Practice Notes

Burton by Bradford v. Barnett, 615 So. 2d 580 (Miss. 1993) (explaining Mississippi's pure comparative negligence doctrine).

Miss. R. Civ. P. 49(b) authorizes the jury to return a verdict which assigns a percentage of negligence attributable to both the plaintiff and the defendant. Rose v. Clenney, 748 So. 2d 172, 176 (Miss. Ct. App. 1999).

Miss. Code Ann. 11-7-15; Miss. Code Ann. 85-5-7.

§ 14:9 Assumption of risk

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that the plaintiff:

1. Knew that the ________ *[conditions or situation]* surrounding ________ *[[him/her/it] or the position]* in which *[he/she/it]* placed *[himself/herself/itself]* ________ *[were or was]* inconsistent with *[his/her/its]* safety by ________ *[describe facts tending to show knowledge]*; and
2. Appreciated the danger; and
3. Deliberately and voluntarily chose to expose *[himself/herself/itself]* to that danger in such a manner as to assent to the continuance of the dangerous situation;

then the plaintiff assumed the risk of injury and cannot recover from the defendant, and your verdict shall be for the defendant.

_______ *[In determining whether the plaintiff knew that the conditions in which [he/she/it] placed [himself/herself/itself] were inconsistent with [his/her/its] own safety, you may find either that the plaintiff actually knew of [his/her/its] condition of danger, or that the circumstances surrounding the plaintiff were so obviously dangerous to [his/her/its] safety that [he/she/it] must have known of the danger.]*

NOTES TO FORM

Practice Notes

Assumption of the risk doctrine has been subsumed into Mississippi's comparative negligence standard. Churchill v. Pearl River Basin Development Dist., 757 So. 2d 940 (Miss. 1999); see also Donald v. Triple S Well Service, Inc., 708 So. 2d 1318 (Miss. 1998).

Nichols v. Western Auto Supply Co., Inc., 477 So. 2d 261 (Miss. 1985); Singleton v. Wiley, 372 So. 2d 272 (Miss. 1979); Alley v. Praschak Mach. Co., 366 So. 2d 661 (Miss. 1979).

§ 14:10 Comparative negligence with counterclaim—Method for computing damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. _______, defendant, was negligent; and
2. _______, plaintiff, was negligent; and
3. The negligence of both _______, defendant, and _______, plaintiff, were proximate contributing causes of the accident in this case; and
4. _______, plaintiff, sustained injuries and damages caused by the combined negligence of _______, defendant and _______, plaintiff;

then you will, in arriving at your verdict, first determine that sum of money which will fairly and adequately compensate ________, plaintiff for said injuries and damages, and then reduce this sum in proportion to the causal negligence to ________, plaintiff using the following method:

1. Determine the proportion that ________, plaintiff's causal negligence bears to the causal negligence as a whole, as a part or percentage of 100 %= total causal negligence of both actors in case);
2. Multiply the sum of money you determined as defendant's damages by the percentage figure representing the proportion of ________, defendant's causal negligence;
3. Subtract the results of your multiplication from the sum you first determined to be ________, defendant's damages;
4. Return a verdict in that amount for ________, defendant.

NOTES TO FORM

Practice Notes

Andrews v. Jitney Jungle Stores of America, Inc., 537 So. 2d 447 (Miss. 1989); Blackmon v. Payne, 510 So. 2d 483 (Miss. 1987); Bell v. City of Bay St. Louis, 467 So. 2d 657 (Miss. 1985).

§ 14:11 Strict liability for ultra-hazardous activities

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. Defendant for *[his/her/its]* own purposes:
   a. Kept on *[his/her/its]* premises a ________ *[describe]* which did not naturally belong there; or
   b. Did ________ *[describe activity]*; and
2. The natural tendency of ________ *[describe]* is to become a

nuisance or harm others if it ________ *[escapes or explodes or ________ (other)]*; and

3. The ________ *[describe]* ________ *[escaping or exploding or ________ (other)]* was the sole proximate cause or a proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

See Restatement (Second) of Torts § 519

§ 14:12 Parental liability for malicious and willful acts of children

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Name of child]* is a child over the age of ten and under the age of 18, and that;

2. ________ *[Name(s) of parent(s)]* ________ *[is or are]* the parent(s) of ________ *[name of child]* ________ *[and that parental custody and control have not been removed by court order]*;

3. That ________ *[name of child]* maliciously and willfully ________ *[damaged or destroyed]* ________ *[describe property]*, the property of ________ *[name of property owner]* by ________ *[describe acts of child]*;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Recovery from the parent(s) under this Code section is limited to $5,000 plus court costs. However, this Code section is intended to be in addition to any other actions which the property owner is entitled to maintain as a result of the damage or destruction.

Liability of a parent for the acts of his child in an employer-employee or principal-agent relationship is addressed in the general agency instructions.

Miss. Code Ann. § 93-13-2.

§ 14:13 Standard of care for protection of children—General—Motor vehicle operators

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. Defendant knew or had reason to know that children were likely to be in the vicinity because ________ *[describe facts indicating presence of children]*; and
2. Defendant failed to use reasonable care under the circumstances to avoid injuring children ________ *[describe alleged negligence]*; and
3. Defendant's failure to use reasonable care was the sole proximate cause or proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Bland v. Briggs, 512 So. 2d 894 (Miss. 1987); McGee v. Bolen, 369 So. 2d 486 (Miss. 1979).

§ 14:14 No inference from occurrence of accident

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

As a general rule, the mere fact that an ________ *[accident or injury]* has occurred is not, of itself, evidence of negligence on the part of anyone.

NOTES TO FORM

Practice Notes

Nielson v. Miller, 259 So. 2d 702, 706 (Miss. 1972) (This instruction is in the following language: "The court instructs the jury for the Defendant that the mere fact that an accident happened, standing alone, does not, unless otherwise stated, permit the jury to draw an inference that the accident was caused by anyone's negligence." This abstract instruction does not relate to the facts in the case on trial, and is erroneous).

Creel v. General Motors Corp., 233 So. 2d 105, 109–10 (Miss. 1970) (Defendant obtained an instruction that the mere fact that the accident occurred and plaintiff was injured of itself alone constitutes no evidence of any negligence or breach of other duty by [defendant], and does not raise a presumption that it was due to any act of negligence or other breach of duty. Since this is not a res ipsa loquitur case, this instruction was not error). This instruction should not be used in cases where the doctrine of *res ipsa loquitur* has been held applicable by the court. Restatement Second, Torts § 430 (1965).

Research References

West's Key Number Digest

Negligence ⚷272k1579

Legal Encyclopedias

C.J.S., Negligence § 263

§ 14:15 Other party's conduct

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In determining whether the ______ *[plaintiff or defendant]* may assume that the ______ *[defendant or plaintiff]* would exercise ordinary care and ______ *[state act]*, you should consider whether a reasonably prudent person would assume that the ______ *[defendant or plaintiff]* would ______ *[state act]* under the circumstances then and there existing.

NOTES TO FORM

Practice Notes

Clark v. Gilmore, 213 Miss. 590, 57 So. 2d 328 (1952).

Research References

West's Key Number Digest
Negligence 🔑530 to 535(3)

Legal Encyclopedias
C.J.S., Negligence §§ 283 et seq.

§ 14:16 Duty of volunteers

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Absent some special relationship, a person is under no legal obligation to come to the aid of another in danger; but one who voluntarily undertakes to aid another must use reasonable care and prudence in giving such aid.

If you find from a preponderance of the evidence in this case that:

1. Defendant volunteered to assist plaintiff; and
2. Defendant failed to use reasonable care by ________ *[describe alleged act]*; and
3. Defendant's failure to use reasonable care was the sole proximate cause or proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

This instruction does not apply in cases where the peril in which the other person is placed is due to any active force under the potential or actual volunteer's control. The special relationships which impose some duty to render aid or care are described in Restatement Second, Torts § 314A (1965); common carriers, innkeepers, and possessors of land who hold it open to the public are the most common.

The instruction as written would not be applicable if the facts support immunity granted volunteers under Miss. Code Ann. § 17-17-57 (immunity in rendering aid in accidents involving discharge of hazardous materials); Miss. Code Ann. § 59-21-55 (involving boating accidents); Miss Code Ann. § 73-25-37 (immunity for a volunteer health care provider rendering emergency care); and Miss. Code Ann. §§ 95-9-1 et seq. (immunity for organized charity volunteers and sports officials).

Long v. Patterson, 198 Miss. 554, 22 So. 2d 490 (1945); Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966).

Research References

West's Key Number Digest

Negligence ⚷217 to 219

Legal Encyclopedias

C.J.S., Negligence § 84

Model Codes and Restatements

Restatement Second, Torts §§ 323 to 325

Chapter 15

Owners and Occupiers of Land

§ 15:1 Licensee—Definition
§ 15:2 General—Ascertaining liability
§ 15:3 Social guest—Definition
§ 15:4 Trespasser—Definition
§ 15:5 General duty to licensees and trespassers
§ 15:6 Duty to licensee when presence is known or expected
§ 15:7 Simple negligence exception to duty owed licensee (Hoffman exception)
§ 15:8 Invitee—Definition
§ 15:9 Duty to invitees
§ 15:10 Invitee—Change of status
§ 15:11 Attractive nuisance—Duty to trespassing children—Conditions not inherently dangerous
§ 15:12 — —Inherently dangerous condition
§ 15:13 Slip and fall on business premises—Dangerous condition traceable to proprietor's own negligence
§ 15:14 —Dangerous condition traceable to third person

Research References

West's Key Number Digest

Licenses 🔑43 to 64; Negligence 🔑1000 to 1320

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

Forms

Am. Jur. Pleading and Practice Forms, Trespass §§ 4 to 54

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§ 15:1 Licensee—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a licensee is a person who enters upon the property of another for *[his/her]* own convenience, pleasure or benefit pursuant to the license or implied permission of the owner.

NOTES TO FORM

Practice Notes

Saucier Through Saucier v. Biloxi Regional Medical Center, 708 So. 2d 1351, 1355 (Miss. 1998); Holliday v. Pizza Inn, Inc., 659 So. 2d 860, 865 (Miss. 1995) (holding that entrant onto business premises after hours, with manager's approval, for unauthorized social function was a licensee and not a business invitee); Skelton By and Through Roden v. Twin County Rural Elec. Ass'n, 611 So. 2d 931, 936 (Miss. 1992); Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 647 (Miss. 1988); Adams By and Through Adams v. Fred's Dollar Store of Batesville, 497 So. 2d 1097, 1110 (Miss. 1986); White v. Mississippi Power & Light Co., 196 So. 2d 343, 349, 30 A.L.R.3d 754 (Miss. 1967); Marlon Inv. Co. v. Conner, 246 Miss. 343, 149 So. 2d 312, 315 (1963); Kelley v. Sportsmen's Speedway, 224 Miss. 632, 80 So. 2d 785, 790 (1955).

§ 15:2 General—Ascertaining liability

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order to ascertain any liability of the ______ *[owner or occupant or person in control]* of property, you must determine three issues:

1. The status of the injured party, that is, whether the plaintiff, ______ *[name of plaintiff]*, was a trespasser, licensee, or invitee; and
2. The duty, if any the defendant, as ______ *[owner or occupant or person in control]*, owed to the plaintiff based upon *[his/her]* particular status; and
3. Whether the defendant breached *[his/her]* duty of care to the plaintiff.

NOTES TO FORM

Practice Notes

Little by Little v. Bell, 719 So. 2d 757, 760 (Miss. 1998) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)); Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008, 1011 (Miss. 1978).

§ 15:3 Social guest—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A social guest is one who enters ______ *[and remains]* upon premises under the possession or control of another by the express or implied invitation of such person to enjoy hospitality and society or to receive a gratuitous favor. There is no mutuality of benefit in a business or commercial sense flowing between the guest and *[his/her]* host, and the status of the guest is that of a licensee.

NOTES TO FORM

Practice Notes

Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)) (declaring duty owed to licensee is to refrain from wilfully or wantonly causing injury); Raney v. Jennings, 248 Miss. 140, 158 So. 2d 715, 717-18 (1963); Wright v. Caffey, 239 Miss. 470, 123 So. 2d 841, 843 (1960); Cook v. Stringer, 764 So. 2d 481, 483-84 (Miss. Ct. App. 2000); Joiner v. Haley, 777 So. 2d 50 (Miss. Ct. App. 2000) (discussing general theory of premises liability in landlord/tenant context and declaring invited guest on premises of rental property afforded same protections extended to tenant).

Although a social guest is, by definition, a licensee, a social guest who is injured on leased premises *may* be afforded greater protection under a products liability theory. Specifically, the Mississippi Supreme Court has held that the landlord-tenant relationship gives rise to an implied warranty of habitability which requires the landlord to provide reasonably safe premises at the inception of a lease. Joiner v. Haley, 777 So. 2d 50 (Miss. Ct. App. 2000) (citing concurring opinion by Justice Sullivan in O'Cain v. Harvey Freeman and Sons, Inc. of Mississippi, 603 So. 2d 824, 833 (Miss. 1991)). The implied warranty of habitability now extends beyond the tenant and imposes a duty, "by implication, to those additional persons who could reasonably be foreseen as coming on the property at the behest of the tenant [i.e., social guests]." Joiner v. Haley, 777 So. 2d 50 (Miss. Ct. App. 2000).

"Willfulness and wantonness connote knowingly and intentionally doing a thing or wrongful act . . . The guest assumes the ordinary risks which are attached to the premises. No exception is made to the rule because of the fact that the guest enters on the host's express invitation to enjoy his hospitality. A host merely offers his premises for the enjoyment of his guests with the same security which the host and members of his family who reside with him have." Raney v. Jennings, 248 Miss. 140, 158 So. 2d 715, 718 (1963).

Research References

A.L.R. Library

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 A.L.R.4th 294.

§ 15:4 Trespasser—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A trespasser is one who enters upon the property of another without license, invitation, or other right.

NOTES TO FORM

Practice Notes

Brown v. Scott Paper Co., 684 F. Supp. 1392, 1395 n.4 (S.D. Miss. 1987) (declaring duty to trespasser and licensee to be the same under Mississippi law); Adams By and Through Adams v. Fred's Dollar Store of Batesville, 497 So. 2d 1097, 1100 (Miss. 1986); Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008, 1011 (Miss. 1978); Kelley v. Sportsmen's Speedway, 224 Miss. 632, 80 So. 2d 785, 791 (1955).

§ 15:5 General duty to licensees and trespassers

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that

1. ________ *[Defendant]*, was in possession or control of ________ *[describe property]* as the ________ *[owner or occupant or person in charge]*; and

2. ________ *[Plaintiff]*, entered this property with the consent of the ________ *[owner or occupant or person in charge]* for *[his/her]* own purpose or benefit, or entered without permission, consent, or privilege; and

3. The defendant by ________ *[describe act]* willfully and wantonly injured plaintiff; and

4. The defendant's act was a proximate contributing cause of the plaintiff's injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Saucier Through Saucier v. Biloxi Regional Medical Center, 708 So. 2d

1351, 1356 (Miss. 1998); Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35, 37 (Miss. 1989); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760 (Miss. 1989); Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 648 (Miss. 1988); Adams By and Through Adams v. Fred's Dollar Store of Batesville, 497 So. 2d 1097, 1100 (Miss. 1986); Lucas v. Mississippi Housing Authority No. 8, 441 So. 2d 101, 103 (Miss. 1983); West v. Williams, 245 So. 2d 591 (Miss. 1971); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524, 526 (Miss. 1970); White v. Mississippi Power & Light Co., 196 So. 2d 343, 350, 30 A.L.R.3d 754 (Miss. 1967); Raney v. Jennings, 248 Miss. 140, 158 So. 2d 715 (1963) (defining "willfulness" and "wantonness"); Marlon Inv. Co. v. Conner, 246 Miss. 343, 149 So. 2d 312 (1963) (declaring that possessor of land owes licensee no duty to maintain land in safe condition, but only to disclose to licensee any concealed, dangerous condition on premises of which owner has knowledge, and to exercise reasonable care to see that licensee is aware of danger); Kelley v. Sportsmen's Speedway, 224 Miss. 632, 80 So. 2d 785, 790 (1955); Murry Chevrolet Co. v. Cotten, 169 Miss. 521, 152 So. 657, 658 (1934).

§ 15:6 Duty to licensee when presence is known or expected

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. } Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]*, was in possession or control of ________ *[describe property]* as the ________ *[owner or occupant or person in charge]*; and

2. ________ *[Plaintiff]*, entered this property with the consent of the ________ *[owner or occupant or person in charge]* for *[his/her]* own purpose or benefit; and

3. ________ *[Describe condition]* constituted a dangerous condition upon this property; and

4. The defendant knew or should have known about this condition; and

5. The defendant knew or should have reasonably anticipated the plaintiff's presence on *[his/her]* property; and

6. The defendant failed to take measures reasonably calculated to prevent this condition from injuring the plaintiff; and

7. The defendant's negligence was a proximate contributing cause of plaintiff's injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Brown v. Scott Paper Co., 684 F. Supp. 1392, 1396 (S.D. Miss. 1987) (clarifying the "*Hoffman* exception" to apply only in situations in which landowner is aware of the licensee's presence); Saucier Through Saucier v. Biloxi Regional Medical Center, 708 So. 2d 1351 (Miss. 1998); Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008 (Miss. 1978); Marlon Inv. Co. v. Conner, 246 Miss. 343, 149 So. 2d 312 (1963) (declaring that possessor of land owes licensee no duty to maintain land in safe condition, but only to disclose to licensee any concealed, dangerous condition on premises of which owner has knowledge, and to exercise reasonable care to see that licensee is aware of danger); Murry Chevrolet Co. v. Cotten, 169 Miss. 521, 152 So. 657, 658 (1934).

If the case in which this instruction is contemplated involves allegations of the defendant's active negligence in the operation or control of his business, the *Hoffman* exception may apply. Essentially, the *Hoffman* exception allows recovery for injuries caused by active negligence under a simple negligence theory instead of requiring proof of wanton and willful behavior in limited cases. The foregoing instruction references only the ordinary standard of care owed to a known licensee. For the *Hoffman* exception, see Mississippi Civil Jury Instruction § 15:7 in this chapter and accompanying notes following form.

§ 15:7 Simple negligence exception to duty owed licensee (Hoffman exception)

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]*, was in possession or control of ________ *[describe property]* as the ________ *[owner or occupant or person in charge]*; and

2. ________ *[Plaintiff]*, entered this property with the consent of the ________ *[owner or occupant or person in charge]* for *[his/her]* own purpose or benefit; and

3. The defendant knew of the plaintiff's presence on *[his/her]* property; and

4. The defendant engaged in ________ *[describe act]* which act was done in the control or operation of *[his/her]* business; and

5. The defendant's actions constituted affirmative or active negligence in the control or operation of activities on the premises; and

6. ________ *[Describe act]*, subjected the plaintiff to unusual danger, or increased the hazard to the plaintiff; and

7. The defendant's negligence was a proximate contributing cause of the plaintiff's injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Brown v. Scott Paper Co., 684 F. Supp. 1392 (S.D. Miss. 1987); Little by Little v. Bell, 719 So. 2d 757, 761 (Miss. 1998) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)); Saucier Through Saucier v. Biloxi Regional Medical Center, 708 So. 2d 1351 (Miss. 1998); Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)); Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008 (Miss. 1978); Astleford v. Milner Enterprises, Inc., 233 So. 2d 524, 526 (Miss. 1970); Marlon Inv. Co. v. Conner, 246 Miss. 343, 149 So. 2d 312, 316 (1963); Murry Chevrolet Co. v. Cotten, 169 Miss. 521, 152 So. 657 (1934).

The foregoing instruction effectively lowers the bar for recovery of damages in situations in which a plaintiff was injured by a defendant's active negligence. Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008 (Miss. 1978), and its progeny relieved a licensee of the burden of proving the possessor to have willfully and/or wantonly caused his injury. In limited circumstances, the plaintiff may recover under simple negligence standards.

Hoffman was the first Mississippi case to recognize a difference between "active" and "passive" negligence in matters of premises liability. Generally speaking, the duty owed to a licensee is only the duty to refrain from willfully or wantonly injuring him. See also Saucier Through Saucier v. Biloxi Regional Medical Center, 708 So. 2d 1351 (Miss. 1998); Astleford v. Milner

Enterprises, Inc., 233 So. 2d 524 (Miss. 1970). Quoting Prosser, Law of Torts (4th Ed. 1971), page 379, the *Hoffman* court adopted the position that "[i]t is now generally held that as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee. . ." Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008, 1013 (Miss. 1978). The *Hoffman* court concluded that "[t]he premises owner is liable for injury proximately caused by his affirmative or active negligence in the operation or control of a business which subjects either licensee or invitee to unusual danger, or increases the hazard to him, when his presence is known and that the standard of ordinary and reasonable care has application." Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008, 1013 (Miss. 1978). The "*Hoffman* exception" was refined further in Hughes v. Star Homes, Inc., 379 So. 2d 301 (Miss. 1980) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)). *Hughes* held that the new and heightened duty of care owed to known licensees is limited to "those cases involving injury resulting from active conduct as distinguished from conditions of the premises, or passive negligence." Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)). *Hoffman*, therefore, has been declared to be a very limited exception. Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)).

In order to fall within the *Hoffman* exception:

- The landowner must be aware of the licensee's presence upon the premises;
- The landowner must engage in affirmative or active negligence in the operation or control of a business;
- The landowners' conduct in regards there to must subject the licensee or invitee to unusual danger, or increase the hazard to him; and
- The landowner's active or affirmative negligence must have proximately caused the plaintiff's injury.

Little by Little v. Bell, 719 So. 2d 757, 761 (Miss. 1998) (overruled by, Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019)) (emphasis added).

§ 15:8 Invitee—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner as either a business or public invitee.

A business invitee is a person who goes on the premises of another on the business of the owner, occupant, or person in charge or for their mutual advantage.

A public invitee is a person who goes on the premises of another as a member of the public for a purpose for which the land is held open.

NOTES TO FORM

Practice Notes

Case v. Wal-Mart Stores, Inc., 13 F. Supp. 2d 597, 600 (S.D. Miss. 1998) (interpreting Mississippi law to hold that employee of vendor assigned to work full-time on premises of merchant vendee is business invitee); Fulton v. Robinson Industries, Inc., 664 So. 2d 170, 175 (Miss. 1995) ("An owner or operator of a business still owes a duty to an invitee to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition or warn of dangerous conditions not readily apparent, which owner or occupant knows of, or should know of, in the exercise of reasonable care."); Holliday v. Pizza Inn, Inc., 659 So. 2d 860, 865 (Miss. 1995) (holding that entrant onto business premises after hours, with manager's approval, for unauthorized social function was a licensee and not a business invitee); Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35, 40 (Miss. 1989) (discussing possibility of a distinction between wholesalers and retailers for purposes of premises liability); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760 (Miss. 1989); Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 647 (Miss. 1988); Adams By and Through Adams v. Fred's Dollar Store of Batesville, 497 So. 2d 1097, 1100 (Miss. 1986); Lucas v. Mississippi Housing Authority No. 8, 441 So. 2d 101, 103 (Miss. 1983); Alexander v. Jackson County Historical Soc., Inc., 227 So. 2d 291, 292 (Miss. 1969); Wright v. Caffey, 239 Miss. 470, 123 So. 2d 841, 842 (1960); Nowell v. Harris, 219 Miss. 363, 68 So. 2d 464, 467 (1953); Gulf Refining Co. v. Moody, 172 Miss. 377, 160 So. 559, 562 (1935) (stating that generally, a child who accompanies a parent or other adult customer onto business premises to conduct business is an invitee).

Research References

Model Codes and Restatements
Restatement Second, Torts § 332

§ 15:9 Duty to invitees

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]*, was in control or possession of ________ *[describe property]* as ________ *[owner or occupant or person in charge]*; and
2. ________ *[Plaintiff]*, was on this property in answer to an express or implied invitation of the defendant, to do business or for their mutual advantage; and
3. ________ *[Describe condition]* constituted a dangerous condition upon this property; and
4. The defendant knew or should have reasonably known about this condition; and
5. The defendant failed to take measures reasonably calculated to remove this danger or to warn the plaintiff of its existence; and
6. The defendant's failure to take such measures was a proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

McGowan v. St. Regis Paper Co., Inc., 419 F. Supp. 742, 744 (S.D. Miss. 1976); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 764 (Miss. 1989); Jerry Lee's Grocery, Inc. v. Thompson, 528 So. 2d 293, 295 (Miss. 1988); Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 648 (Miss. 1988); Downs v. Corder, 377 So. 2d 603, 605 (Miss. 1979); J. C. Penney Co. v. Sumrall, 318 So. 2d 829, 832 (Miss. 1975); Jackson Ready-Mix Concrete v. Sexton, 235 So. 2d 267, 269 (Miss. 1970); Alexander v. Jackson County Historical Soc., Inc., 227 So. 2d 291, 292 (Miss. 1969); Nowell v. Harris, 219 Miss. 363, 68 So. 2d 464, 467 (1953).

§ 15:10 Invitee—Change of status

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Plaintiff]*, ________ *[describe how plaintiff exceeded previous status and permitted area]*; and
2. This area was not included within the express or implied invitation extended to *[him/her]* by the defendant;

then the plaintiff lost *[his/her]* status as an invitee and became a ________ *[licensee or trespasser]*.

NOTES TO FORM

Practice Notes

Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35, 38 (Miss. 1989); Hoffman v. Planters Gin Co., Inc., 358 So. 2d 1008, 1011 (Miss. 1978); Braswell v. Economy Supply Co., 281 So. 2d 669, 672 (Miss. 1973); Dry v. Ford, 238 Miss. 98, 117 So. 2d 456, 458 (1960); Kelley v. Sportsmen's Speedway, 224 Miss. 632, 80 So. 2d 785 (1955).

§ 15:11 Attractive nuisance—Duty to trespassing children—Conditions not inherently dangerous

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]*, ________ *[owned or possessed or controlled]* the ________ *[describe premises at issue]*; and

2. A ________ *[describe structure or other artificial condition]* was located at a place on the land or premises where ________ *[defendant]* knew or should have reasonably known that children were likely to be ________ *[as trespassers]*; and

3. The ________ *[describe structure or other artificial condition]* was:

   a. An artificial condition, not produced by the ordinary course of nature or manmade duplication of such condition; and

   b. Was unusually or peculiarly attractive to children; and

   c. Of such a nature that it was likely to, or would probably, cause injury to children attracted to it; and

4. Defendant knew or should reasonably have known of the risk to children from the ________ *[describe structure or other artificial condition]*; and

5. Defendant failed to exercise ordinary care to prevent children from ________ *[learning of the presence of the structure or condition or obtaining access to the structure or condition]*; and

6. ________ *[Claimant child]* was attracted or lured onto the ________ *[land or premises at issue]* by the ________ *[describe structure or other artificial condition]*; and

7. ________ *[Claimant child]* was not warned of the danger from the structure or condition, and ________ *[the danger or peril from the ________ (describe structure or other artificial condition) was so hidden or concealed that it was not readily visible to ________ (claimant child)]* ________ *[there was present on the premises ________ (describe distractive influence) which prevented ________ (claimant child) from discovering the danger from the ________ (describe structure or other artificial condition) or from appreciating the danger from such ________ (describe structure or other artificial condition)]*; and

8. ________ *[Claimant child]* was injured by the ________ *[describe structure or other artificial condition]*; and

9. The failure of ________ *[defendant]* to exercise ordinary care to prevent children from ________ *[learning of the presence of the structure or condition or obtaining access to the structure or condition]* was a proximate contributing cause of ________ *[claimant child's]* injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant(s).

NOTES TO FORM

Practice Notes

Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737 (5th Cir. 1971); Skelton By and Through Roden v. Twin County Rural Elec. Ass'n, 611 So. 2d 931 (Miss. 1992) (recognizing, among other things that: (1) trees generally cannot be the basis for imposition of liability based upon attractive nuisance doctrine; and that (2) attractive nuisance doctrine applies only to trespassers); Jackson v. City of Biloxi, 272 So. 2d 654 (Miss. 1973); Gordon v. C. H. C. Corp., 236 So. 2d 733 (Miss. 1970).

See also Mississippi Civil Jury Instruction § 15:12.

§ 15:12 Attractive nuisance—Duty to trespassing children—Inherently dangerous condition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]*, ________ *[owned or possessed or controlled]* the ________ *[land or premises at issue]*; and
2. A ________ *[describe structure or other artificial condition]* was located at a place on the land or premises where ________ *[defendant]* knew or had reason to know children were likely to be ________ *[as trespassers]*; and
3. The ________ *[structure or artificial condition]* was:
    a. An artificial condition, that is, one which was not produced by the ordinary course of nature or a man-made duplication of such condition; and
    b. Unusually or peculiarly attractive to children; and
    c. Of such a nature that it was likely to, or would probably cause injury to children attracted to it; and
    d. Inherently dangerous, that is, the danger was from the ________ *[describe structure or other artificial condition]* itself and was not an obvious danger which a child may be reasonably expected to comprehend; and

4. ________ *[Defendant]* knew or should have known of the risk to children from the ________ *[describe structure or other artificial condition)]*; and

5. ________ *[Defendant]* failed to exercise ordinary care to prevent children from ________ *[learning of the presence of the structure or condition or obtaining access to the structure or condition]*; and

6. ________ *[Claimant child]* was attracted or lured onto the ________ *[land or premises at issue]* by the ________ *[describe structure or other artificial condition]*; and

7. ________ *[Claimant child]* was not warned of the danger from the structure or condition, and because of *[his/her]* age, ________ *[was too young to be charged with knowledge of the danger involved in playing with the ________ (describe structure or other artificial condition) or in the vicinity of the ________ (describe structure or other artificial condition)]*, ________ *[did not know and appreciate the danger incurred by [him/her] playing with the ________ (describe structure or other artificial condition) or in playing in the vicinity of the ________ (describe structure or other artificial condition]*; and

8. ________ *[Claimant child]* was injured by the ________ *[describe structure or other artificial condition]*; and

9. Failure of ________ *[defendant]* to exercise ordinary care to prevent children from ________ *[learning of the presence of the structure or condition or obtaining access to the structure or condition]* was a proximate contributing cause of ________ *[claimant child's]* injuries;

then your verdict shall be for the plaintiff(s).

However, if you believe that plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant(s).

NOTES TO FORM

Practice Notes

Skelton By and Through Roden v. Twin County Rural Elec. Ass'n, 611 So. 2d 931 (Miss. 1992) (recognizing, among other things that: (1) trees generally cannot be the basis for imposition of liability based upon attractive nuisance doctrine; and that (2) attractive nuisance doctrine applies only to trespassers); McGill v. City of Laurel, 252 Miss. 740, 173 So. 2d 892 (1965) (holding that attractive nuisance doctrine does not apply to obvious, natural dangers; an occupant may assume that child's guardians have warned child about readily apparent dangers); Bonhomie & H.S. Ry. Co. v. Hinton, 155 Miss. 173, 124 So. 271 (1929).

§ 15:13 Slip and fall on business premises—Dangerous condition traceable to proprietor's own negligence

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ______ *[Defendant]*, was in possession or control of the business premises of ______ *[describe property]* as the ______ *[owner or occupant or person in charge]*; and
2. ______ *[Plaintiff]* was an invitee of the defendant; and
3. The defendant's own negligence caused ______ *[describe dangerous condition]*, which was a dangerous condition on the premises; and
4. The plaintiff was injured by ______ *[describe how plaintiff was injured by dangerous condition]*; and
5. The defendant's negligence was a proximate contributing cause of the plaintiff's injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Waller v. Dixieland Food Stores, Inc., 492 So. 2d 283, 285 (Miss. 1986); Millers of Jackson, Meadowbrook Road, Inc. v. Newell, 341 So. 2d 101 (Miss. 1976); Mississippi Winn-Dixie Supermarkets v. Hughes, 247 Miss. 575, 156 So. 2d 734 (1963); Robinson v. Ratliff, 757 So. 2d 1098 (Miss. Ct. App. 2000); Taylor v. Biloxi Regional Medical Center, 737 So. 2d 435 (Miss. Ct. App. 1999).

To prove that the owner or occupant or person in charge was negligent, the plaintiff must show either: (1) that the owner or occupant or person in charge caused the dangerous condition; or (2) if the dangerous condition was caused by a third person unconnected with the store operation, that the operator had either actual or constructive knowledge of the dangerous condition. Constructive knowledge is established by proof that the dangerous condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of that condition. Robinson

v. Ratliff, 757 So. 2d 1098 (Miss. Ct. App. 2000) (citing Taylor v. Biloxi Regional Medical Center, 737 So. 2d 435 (Miss. Ct. App. 1999)). Also, for a detailed discussion of vicarious liability which may be imposed upon a premises owner for the negligence of its (apparent) agent, see generally, Miller v. Shell Oil Co., 783 So. 2d 724 (Miss. Ct. App. 2000). For a discussion on comparative negligence and open and obvious hazards, see Breaux v. Grand Casinos of Mississippi, Inc.-Gulfport, 854 So. 2d 1093 (Miss. Ct. App. 2003).

§ 15:14 Slip and fall on business premises—Dangerous condition traceable to third person

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. ________ *[Defendant]*, was in possession or control of the business premises of ________ *[describe property]* ________ as the ________ *[owner or occupant or person in charge]*; and
2. ________ *[Plaintiff]*, was on the defendant's premises for a purpose consistent with the normal business of the defendant; and
3. ________ *[Describe dangerous condition]* constituted a dangerous condition on the premises which was not due to negligence of the defendant; and
4. The defendant knew or, by the exercise of reasonable care, should have known of the existence of the dangerous condition; and
5. The defendant failed to take measures reasonably calculated to remove the danger, if any, or to warn the plaintiff of its existence; and
6. The defendant's failure to take such measures was a contributing proximate cause of the plaintiff's accident and injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of these elements, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Biloxi Regional Medical Center v. David, 555 So. 2d 53 (Miss. 1989); Waller v. Dixieland Food Stores, Inc., 492 So. 2d 283, 285 (Miss. 1986); Edwards v. Cleveland Food, Inc., 437 So. 2d 56 (Miss. 1983); Millers of Jackson, Meadowbrook Road, Inc. v. Newell, 341 So. 2d 101 (Miss. 1976); Robinson v. Ratliff, 757 So. 2d 1098 (Miss. Ct. App. 2000); Taylor v. Biloxi Regional Medical Center, 737 So. 2d 435 (Miss. Ct. App. 1999).

To prove that the owner or occupant or person in charge was negligent, the plaintiff must show either: (1) that the owner or occupant or person in charge caused the dangerous condition; or (2) if the dangerous condition was caused by a third person unconnected with the store operation, that the operator had either actual or constructive knowledge of the dangerous condition. Constructive knowledge is established by proof that the dangerous condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of that condition. Robinson v. Ratliff, 757 So. 2d 1098 (Miss. Ct. App. 2000) (citing Taylor v. Biloxi Regional Medical Center, 737 So. 2d 435 (Miss. Ct. App. 1999)).

For a discussion on comparative negligence and open and obvious hazards, see Breaux v. Grand Casinos of Mississippi, Inc.-Gulfport, 854 So. 2d 1093 (Miss. Ct. App. 2003).

Chapter 16

Products Liability

§ 16:1 Breach of express warranty
§ 16:2 Design defect
§ 16:3 Manufacturing defects
§ 16:4 Failure to warn
§ 16:5 State-of-the-art defense
§ 16:6 Inherent characteristics defense
§ 16:7 Open and obvious danger defense
§ 16:8 Assumption of the risk
§ 16:9 Alteration of the product
§ 16:10 Misuse of product defense
§ 16:11 Intervening cause
§ 16:12 Innocent seller or designer defense

Research References

West's Key Number Digest

Products Liability 🔑1 to 98; Torts 🔑14.1

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Proof of Liability of Manufacturer for Injury Caused By Exploding Grinding Wheel, 66 Am. Jur. Proof of Facts 3d 183
Automobile Airbag Malfunction Litigation: Practice and Strategy, 83 Am. Jur. Trials 1
Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

Forms

Am. Jur. Pleading and Practice Forms, Torts §§ 29 to 32

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§ 16:1 Breach of express warranty

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a manufacturer, designer, or seller of a product is liable for damages caused by that product, other than commercial damage to the product itself, if you find from a preponderance of the evidence:

1. That *[[name of manufacturer]/[name of designer]/[name of seller]]* was in the business of selling *[name of product]* and did in fact sell *[name of specific product at issue]*; and
2. That at the time the *[name of product]* left the control of *[[name of manufacturer]/[name of designer]/[name of seller]]*, the defendant represented that the *[name of product]* would *[describtion of warranty alleged by plaintiff and breached by defendant]*, and the defendant's claims amounted to an express warranty or other express factual representation upon which the plaintiff justifiably relied in electing to use the *[name of product]*; and
3. That the warranty or other express factual representation was breached or false, which made the product defective; and
4. The defective condition rendered the product unreasonably dangerous to the user or consumer; and
5. The defective and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages;

then your verdict shall be for the plaintiff.

However, if the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(a)(i)(4).

Section 11-1-63 was amended in 2014 to include "designer."

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 722 to 724 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 308 to 311 (Spring 1996)

§ 16:2 Design defect

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. — Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a manufacturer, designer, or seller of a product is liable for damages caused by that product, other than commercial damages to the product itself, if you find from a preponderance of the evidence in this case that:

1. *[[Name of manufacturer]/[Name of designer]/[Name of seller]]* was in the business of selling *[name of product]* and did in fact sell *[name of specific product at issue]*; and
2. The *[name of product]* was at the time it left the control of *[[name of manufacturer]/[name of designer]/[name of seller]]* designed in a defective manner, in that it *[description of design defect]*; and
3. That at the time the *[name of product]* left the control of *[[name of manufacturer]/[name of designer]/[name of seller]]*, *[[name of manufacturer]/[name of designer]/[name of seller]]* knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which the plaintiff now seeks recovery; and
4. That as a result of the design defect, the ________ *[name of product]* failed to function as expected; and
5. That a feasible design alternative existed which would have to a reasonable probability prevented the harm suffered by the plaintiff without impairing the utility, usefulness, practicality or desirability of the ________ *[name of product]* to users or consumers; and
6. The defective condition or failure to use a feasible design alternative rendered the ________ *[name of product]* unreasonably dangerous to the user or consumer; and

7. The defective and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages;

then your verdict shall be for the plaintiff.

However, if the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(a)(i)(3).

Section 11-1-63 was amended in 2014 to include "designer."

As to nonliability of "occasional sellers," see McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 414 to 416, Spring, 1996, and Scordino v. Hopeman Bros., Inc., 662 So. 2d 640 (Miss. 1995) (pre-Act definition of "seller").

As to "risk-utility" analysis, see Horton v. American Tobacco Co., 667 So. 2d 1289, 1291 (Miss. 1995).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 712 to 713 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 277 to 303 (Spring 1996)

§ 16:3 Manufacturing defects

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a manufacturer, designer, or seller of a product is liable for damages caused by that product, other than commercial damages to the product itself, if you find from a preponderance of the evidence in this case:

1. That the *[[name of manufacturer]/[name of designer]/[name of seller]]* was in the business of selling *[name of product]* and did in fact sell *[name of specific product at issue]*; and

2. That at the time the *[name of product]* left the control of *[[name of manufacturer]/[name of designer]/[name of seller]]*, the *[name of product]* was defective because it deviated in a material way from the *[[name of manufacturer]/[name of designer]/[name of seller]]*'s specifications or from otherwise identical units manufactured to the same manufacturing specifications; and

3. That the defective condition rendered the *[name of product]* unreasonably dangerous to the user or consumer; and

4. That the defective and unreasonably dangerous condition of the product was the proximate cause of the plaintiff's damages;

then your verdict shall be for the plaintiff.

However, if the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(a)(i)(1).

Section 11-1-63 was amended in 2014 to include "designer."

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 716 to 718 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 307 to 308 (Spring 1996)

§ 16:4 Failure to warn

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a manufacturer, designer, or seller of a product is liable for damages caused by that product, other than commercial damages to the product itself if you find from a preponderance of the evidence in this case:

1. That *[[name of manufacturer]/[name of designer]/[name of seller]]* was in the business of selling *[name of product]* and did in fact sell *[name of specific product at issue]*; and

2. (a) That at the time the *[name of specific product at issue]* left the control of the defendant, the *[name of product]* was defective because it failed to contain adequate warning(s) or instruction(s) to the user or consumer that a reasonably prudent person in the same or similar circumstances would have provided with respect to danger(s), if any, posed by the product, and which likewise would communicate sufficient information on the danger(s) and safe use of the *[name of product]*, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases a *[name of product]*; or

Alternate instruction 1. For cases involving prescription drugs, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person:

2. (b) At the time the *[name of specific product at issue]* left the control of the defendant the *[name of product]* was defective because it failed to contain adequate warning(s) or instruction(s) that a reasonably prudent person in the same or similar circumstances would have provided with respect to danger(s), if any, posed by the product, and which likewise would communicate sufficient information on the danger(s) and safe use of the *[name of product]*, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product; and

3. That at the time the *[name of product]* left the control of *[[name of manufacturer]/[name of designer]/[name of seller]]*, *[he/she]* knew, or in light of reasonably available knowledge should have known about the danger, if any, that caused the damage for which the plaintiff now seeks recovery; and

4. That at the time the *[name of product]* left the control of *[[name of manufacturer]/[name of designer]/[name of seller]]*, an ordinary user or consumer would not recognize the danger(s) posed by the *[name of product]*; and

5. The failure of *[[name of manufacturer]/[name of designer]/[name of seller]]* to provide adequate warning(s) of the danger(s) posed by the *[name of product]* rendered the *[name of product]* unreasonably dangerous to the user or consumer; and

6. That the failure of *[[name of manufacturer]/[name of*

designer]/[name of seller]] to include adequate warning(s) and instruction(s) was the proximate cause of the plaintiff's damages;

then your verdict shall be for the plaintiff.

However, if the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(c)(i) and (ii).

Section 11-1-63 was amended in 2014 to include "designer."

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 720 to 722 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 303 to 305 (Spring 1996)

§ 16:5 State-of-the-art defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Regardless of the sufficiency of the proof offered by the plaintiff as to the existence of a design defect, if you find by a preponderance of the evidence:

1. That *[[name of manufacturer]/[name of designer]/[name of seller]]* used the best scientific technology that was practically and economically feasible at the time the product was made or marketed; and

2. That there existed no feasible design alternative which would have to a reasonable probability prevented the harm suffered by the plaintiff without impairing the utility, usefulness, practicality or desirability of the product to users or consum-

ers;

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

This defense is applicable only to design defects.

Miss. Code Ann. § 11-1-63(f)(ii).

Section 11-1-63 was amended in 2014 to include "designer."

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 715 (Spring 1994)

§ 16:6 Inherent characteristics defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Regardless of the sufficiency of the proof offered by the plaintiff as to the existence of a design defect, if you find by a preponderance of the evidence:

1. That the plaintiff's damages were caused by ________ *[describe nature of inherent characteristic of the product which caused the plaintiff's damages]*, an inherent characteristic of the ________ *[name of product]* which is a generic aspect of the product; and
2. That the ________ *[inherent characteristic]* cannot be eliminated without substantially compromising the product's usefulness or desirability; and
3. That the ________ *[inherent characteristic]* is recognized by the ordinary person with the ordinary knowledge common to the community;

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

This instruction is only applicable to design defects.
Miss. Code Ann. § 11-1-63(b).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 713 to 715 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 303 to 307 (Spring 1996)

§ 16:7 Open and obvious danger defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.   Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, regardless of the sufficiency of proof offered by the plaintiff as to the existence of a failure to provide adequate instruction(s) or warning(s), if you find by a preponderance of the evidence that the danger posed by the ________ *[name of product]* was known or was open and obvious to the plaintiff, or should have been known or open and obvious to the plaintiff, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume ________ *[name of product]*, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(e).

The existence of an open and obvious danger will serve as a complete bar to recovery in product liability cases based on a failure to warn. However, its application as to products liability cases based on manufacturing defect, design defect and warranty cases is not entirely clear under the Act. Presumably, the existence of an open and obvious danger would preclude the plaintiff from being able to prove an essential element of its case when based on design defect and breach of warranty cases. Perhaps only those cases based on deviation defects will not be entirely barred by the defense of an open and obvious danger. McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 316, Spring, 1996.

Cooper v. General Motors Corp., 702 So. 2d 428, 442 (Miss. 1997).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 750 to 751 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 315 to 317 (Spring 1996)

§ 16:8 Assumption of the risk

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, regardless of the sufficiency of proof offered by the plaintiff as to the existence of a defective and unreasonably dangerous product, if you find by a preponderance of the evidence:

1. That the plaintiff had knowledge of a condition of the ________ *[name of specific product at issue]* that was inconsistent with his/her safety; and
2. That the plaintiff appreciated the danger in the condition; and
3. That the plaintiff deliberately and voluntarily chose to expose himself/herself to that danger in such a manner as to register assent on the continuance of the dangerous condition;

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(d).

If the defenses of contributory negligence and assumption of the risk overlap, only the instruction as to contributory negligence may be given. It is reversible error to instruct the jury on assumption of the risk in this situation. An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 748 (citing Braswell v. Economy Supply Co., 281 So. 2d 669, 677 (Miss. 1973)). See also Wilks v. American Tobacco Co., 1993 WL 325136 (Miss. Cir. Ct. 1993), judgment aff'd, 680 So. 2d 839 (Miss. 1996).

Use of defense of assumption of the risk may be prohibited in a products liability action unless the defendant admits to the existence of the risk. Wilks v. American Tobacco Co., 680 So. 2d 839 (Miss. 1996).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 748 (Spring 1994)

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 3183 to 319 (Spring 1996)

§ 16:9 Alteration of the product

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Regardless of the sufficiency of proof offered by the plaintiff as to the existence of a defective and unreasonably dangerous product, if you find by a preponderance of the evidence:

1. That ________ *[name of seller/manufacturer]* reasonably expected the ________ *[name of product]* to reach the user or consumer without substantial change in the condition in which it was sold; and

2. That, subsequent to the time the ________ *[name of product]* left the control of ________ *[name of seller/manufacturer]*, the ________ *[name of product]* was substantially changed or altered by the plaintiff or other third party; and

3. That it was the change or alteration of the ________ *[name of product]* which was the proximate cause of the plaintiff's damage(s);

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Whittley v. City of Meridian, 530 So. 2d 1341, 1347 (Miss. 1988) (There is a tendency for courts to hold that intervening conduct or misconduct of a kind that is rare and unusual, and in that sense not reasonably foreseeable, will sever the chain of causation . . . . Likewise, any substantial alteration of a product that was not contemplated by the manufacturer is likely to sever the chain of causation).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 749 (Spring 1994)

§ 16:10 Misuse of product defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that regardless of the sufficiency of proof offered by the plaintiff as to the existence of a defective and unreasonably dangerous product, if you find by a preponderance of the evidence:

1. That the plaintiff ________ *[describe manner in which plaintiff misused the product]*; and
2. That the manner in which the plaintiff misused the product was an abnormal handling or a misuse of the ________ *[name of product]*; and
3. That the misuse of the ________ *[name of product]* was not reasonably foreseeable by the defendant in this case; and
4. That the misuse was the sole proximate cause of the plaintiff's damages;

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63.

Materials Transp. Co. v. Newman, 656 So. 2d 1199, 1202 (Miss. 1995) (issue of misuse is question of fact in Mississippi).

Research References

Law Reviews and Other Periodicals

Harges, An Evaluation of the Mississippi Products Liability Act of 1993, 63 Miss. L.J. 697, 749 (Spring 1994)

Additional References

Ronald W. Eades, Jury Instructions on Products Liability, Second Ed., 9-13 (1993)

§ 16:11 Intervening cause

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that, if you find by a preponderance of the evidence:

1. That the ________ *[identify product and describe intervening act or event]* took place after the product left the control of ________ *[name of seller/manufacturer]*; and
2. That the defendant could not reasonably foresee or anticipate that ________ *[describe intervening act or event]*; and
3. The ________ *[intervening act or event]* was the intervening proximate cause of the damages sought by the plaintiff in this action;

then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Whittley v. City of Meridian, 530 So. 2d 1341, 1347 (Miss. 1988) (There is a tendency for courts to hold that intervening conduct or misconduct of a kind that is rare and unusual, and in that sense not reasonably foreseeable, will sever the chain of causation . . .).

Ronald W. Eades, Jury Instructions on Products Liability, Second Ed., 10-6 (1993) (citing Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988)).

§ 16:12 Innocent seller or designer defense

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a seller or designer, other than the manufacturer, of a product alleged to be defective, shall be liable for damages, if you find from a preponderance of the evidence in this case that the seller or designer:

1. Exercised substantial control over the aspect of the design, testing, manufacture, packaging, or labeling of the product that caused the harm for which the Plaintiff seeks recovery of damages; or
2. Altered or modified the product and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or
3. Had actual or constructive knowledge of the defective condition of the product at the time *[he/she]* supplied the product

then your verdict shall be for the plaintiff.

However, if the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then the innocent seller or designer defendant shall not be liable for damages and your verdict shall read, "We the jury find for the Defendant *[[name of seller]/[name of designer]]*."

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-1-63(h). Section 11-1-63(h) states that the intent of this section is to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product.

Section 11-1-63 was amended in 2014 to include "designer."

[illegible]

1066 (1988) citing Whitley v. [illegible]

[illegible]

IN THE [illegible] CIRCUIT COURT OF [illegible] COUNTY, MISSISSIPPI

[illegible] DISTRICT JUDIC[illegible]

[illegible]

Case No. [illegible]

[illegible] INSTRUC[illegible]

[illegible] by a preponderance of the [illegible]

[illegible] control over the inspection [illegible] packaging [illegible] the Plaintiff [illegible]

[illegible] the product and the [illegible] substantial factor in causing [illegible] known [illegible] the time [illegible]

[illegible] for the plaintiff [illegible]

[illegible] is entitled to recover [illegible] the evidence [illegible]

[illegible]

Chapter 17

Railroads

§ 17:1 Crossings—Duty of train operator in general
§ 17:2 Statutory duty to sound bell or whistle for crossing
§ 17:3 Motorists intending to cross a railroad track—Statutory duty to stop, look and listen
§ 17:4 Duty to trespassers or licensees on tracks
§ 17:5 Motorists seen approaching railway crossing—Duty of train operator
§ 17:6 Duty to maintain safe crossing
§ 17:7 Duty of railroad—Unusually dangerous crossing

Research References

West's Key Number Digest

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Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

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§ 17:1 Crossings—Duty of train operator in general

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The operator of a train is under a duty to persons, crossing or attempting to cross a railroad track at a public or private crossing, to exercise reasonable care, that is, the care that a reasonably prudent operator of a train would exercise under the same or similar circumstances.

NOTES TO FORM

Practice Notes

Alabama Great Southern R. Co. v. Martin, 205 Miss. 851, 39 So. 2d 501 (1949); Bon Homie & H. S. R. Co. v. Ferguson, 160 Miss. 433, 134 So. 146 (1931).

§ 17:2 Statutory duty to sound bell or whistle for crossing

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

This court instructs you that every locomotive engine run by any railroad company in this state is required by statute to be equipped with a bell of at least 30 pounds weight and with a whistle or horn which can be heard distinctly at a distance of 300 yards. The engineer or other train-person on a railroad must blow the whistle or ring the bell at least 300 yards before reaching any place where the railroad crosses over any public highway or municipal street.

1. The defendant, ________ *[name of defendant]*, failed to sound a ________ *[horn or bell]* at least 300 yards before reaching the railroad crossing where the plaintiff, ________ *[name of plaintiff]* was injured; and

2. The failure to sound a ________ *[horn or bell]* was a proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 77-9-225.

The case of Palisi v. Louisville & N. R. Co., 226 F. Supp. 651 (S.D. Miss. 1964), judgment aff'd, 342 F.2d 799 (5th Cir. 1965), held that Miss. Code Ann. § 77-9-225 does not apply to diesel trains.

Slay v. Illinois Cent. Gulf R. Co., 511 So. 2d 875 (Miss. 1987); Illinois Cent. Gulf R. Co. v. Yates, 334 So. 2d 364 (Miss. 1976); Archer v. Gulf, M. & O. R. Co., 186 So. 2d 470 (Miss. 1966); Illinois Cent. R. Co. v. McDaniel, 246 Miss. 600, 151 So. 2d 805 (1963).

§ 17:3 Motorists intending to cross a railroad track—Statutory duty to stop, look and listen

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

This court instructs you that whenever any person driving a vehicle approaches a railroad grade crossing when:

(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train; or

(b) A crossing gate is lowered or a human flagman gives or continues to give a signal of the approach or passage of a railroad train; or

(c) A railroad train approaching within approximately 900 feet of the highway crossing emits a warning signal, and such railroad train, by reason of its speed or nearness to such crossing is an immediate hazard; or

(d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing;

the driver of such vehicle has a duty to stop not less than 15 feet from the nearest rail of such railroad, and not to proceed until *[he/she]* can do so safely.

If you find that plaintiff driver was also negligent and that *[his/her]* negligence was a contributing proximate cause of the accident, then you shall reduce the amount of the verdict according to the Mississippi law of comparative negligence.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 77-9-249.

Badger v. Louisville & N. R. Co., 414 F.2d 880 (5th Cir. 1969); Mitcham v. Illinois Cent. Gulf R. Co., 515 So. 2d 852 (Miss. 1987); Slay v. Illinois Cent. Gulf R. Co., 511 So. 2d 875 (Miss. 1987); Illinois Cent. R. Co. v. Smith, 243 Miss. 766, 140 So. 2d 856 (1962); Tonkel v. Yazoo & M.V.R. Co., 170 Miss. 321, 154 So. 351 (1934).

§ 17:4 Duty to trespassers or licensees on tracks

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. The defendant, ________ *[name of defendant]*, was a railroad company operating a train upon the tracks in the state of Mississippi; and

2. The defendant operator of the locomotive knew or should have known of the presence of the plaintiff ________ *[name of plaintiff]*, upon the track; and

3. The defendant failed to take reasonable action under the circumstances; and
4. The defendant's failure to take such reasonable action was a proximate contributing cause of plaintiff's ________ *[death or serious injury]*;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Maxwell v. Illinois Central Gulf R.R., 513 So. 2d 901 (Miss. 1987); Illinois Cent. Gulf R. Co. v. Ishee, 317 So. 2d 923 (Miss. 1975); Dickerson v. Illinois Cent. R. Co., 244 Miss. 733, 145 So. 2d 913 (1962); Young v. Columbus & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933).

§ 17:5 Motorists seen approaching railway crossing—Duty of train operator

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

An operator of a railway locomotive has the right to assume that an apparently competent person driving a motor vehicle toward a crossing and with a clear and unobstructed view of the train will stop before *[he/she]* reaches the track. The operator is under no duty to stop or slacken the speed of the locomotive until it becomes reasonably apparent to *[him/her]*, or should become reasonably apparent to *[him/her]*, in the exercise of reasonable care, that such person was not going to stop prior to reaching the crossing.

NOTES TO FORM

Practice Notes

This instruction may not be appropriate if the crossing is deemed to be abnormally dangerous.

Gulf, M. & O. R. Co. v. Grubbs, 260 So. 2d 837 (Miss. 1972); Illinois Cent. R. Co. v. Smith, 243 Miss. 766, 140 So. 2d 856 (1962); Fuller v. Illinois Cent. R. Co., 100 Miss. 705, 56 So. 783 (1911).

§ 17:6 Duty to maintain safe crossing

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

This court instructs you that whenever a railroad is constructed so as to cross a highway, it is the duty of the railroad company to make proper and easy grades in the highway, so that the railroad may be conveniently crossed, and to keep such crossings in good repair.

If you find from a preponderance of the evidence in this case that:

1. The defendant, ________ *[name of defendant]*, was a railroad company operating a locomotive in the state of Mississippi; and
2. The defendant failed to maintain its crossing safely; and
3. The condition of the crossing was a proximate contributing cause of the plaintiff, ________ *[name of plaintiff]*'s injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 77-9-251.

New Orleans & N. E. R. Co. v. Phillips, 252 Miss. 438, 172 So. 2d 414 (1965); Mississippi Cent. R. Co. v. Alexander, 169 Miss. 620, 152 So. 653 (1934); Gulf & S. I. R. Co. v. Simmons, 150 Miss. 506, 117 So. 345 (1928); Gulf & S.I.R. Co. v. Saucier, 139 Miss. 497, 104 So. 180 (1925).

§ 17:7 Duty of railroad—Unusually dangerous crossing

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that the ________ *[describe crossing]* was unusually dangerous as a result of ________ *[describe why crossing was unusually dangerous]*, then it was the duty of the defendant to exercise caution commensurate with the situation to avoid collisions with travelers on the highway, such as by decreasing the speed of its train, or by increased warnings, or otherwise, or, if a reduced speed is not desirable, by keeping a flagman on duty, or some other sufficient means to warn travelers, such as gates or other safety devices.

If you find from a preponderance of the evidence that:

1. The ________ *[describe crossing]* was unusually dangerous; and
2. The defendant failed to meet the peril created with necessary precautions; and
3. The defendant's failure to take necessary precautions was a proximate contributing cause of the plaintiff's injuries;

then you shall find for the plaintiff.

However, if you believe that the plaintiff has failed to prove any of these elements by a preponderance of the evidence, then your verdict shall be for the defendants.

NOTES TO FORM

Practice Notes

Badger v. Louisville & N. R. Co., 414 F.2d 880 (5th Cir. 1969); Tucker v. Duncan, 9 F. 867 (C.C.S.D. Miss. 1881); Gulf, M. & O. R. Co. v. Scott, 216 Miss. 532, 62 So. 2d 878 (1953); New Orleans & Northeastern R. Co. v. Lewis, 214 Miss. 163, 58 So. 2d 486 (1952).

Chapter 18

Rules of the Road

§ 18:1 Motorist's duty to comply with motor vehicle and traffic regulations
§ 18:2 Operator's duty to maintain reasonable speed and control
§ 18:3 Operator's duty to inspect vehicle
§ 18:4 Operator's duty to anticipate movements of children
§ 18:5 Simultaneously approaching intersection—No stop signs or traffic control devices
§ 18:6 Imputation of minor's negligence to parents
§ 18:7 Vehicle approaching intersection—No stop or traffic control devices
§ 18:8 Authorized emergency vehicles—Definition
§ 18:9 Right-of-way—Vehicle entering or crossing highway from private road or driveway
§ 18:10 Willful, wanton or reckless operation of a motor vehicle
§ 18:11 Pedestrians
§ 18:12 Automobile driver not absolute insurer

Research References

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Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
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§ 18:1 Motorist's duty to comply with motor vehicle and traffic regulations

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that violations of traffic laws in safety statutes may constitute negligence as a matter of law. Therefore, if you find from a preponderance of the evidence in this case that:

1. The defendant, ________ *[name of defendant]*, while operating a motor vehicle, failed to comply with ________ *[state appropriate statutory violation]* by ________ *[state acts constituting a violation]*; and
2. The defendant's failure to comply with this regulation was the sole proximate cause or proximate contributing cause of plaintiff's injury;

then your verdict shall be for the plaintiff.

However, if you find that the plaintiff has failed to prove any of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Detroit Marine Engineering v. McRee, 510 So. 2d 462 (Miss. 1987); Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346 (Miss. 1986); U-Haul Co. v. White, 232 So. 2d 705 (Miss. 1970).

This instruction, along with language inserted from the particular statute that the defendant is alleged to have violated and the relevant facts, is suggested as nonabstract statement of law. See McRee v. Raney, 493 So. 2d 1299 (Miss. 1986).

§ 18:2 Operator's duty to maintain reasonable speed and control

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that an operator of a motor vehicle has a duty to keep the vehicle under proper control and to drive at a speed which is reasonable and prudent under existing conditions.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The defendant, ________ *[name of defendant]*, was not driving at a reasonable and prudent rate of speed in view of existing conditions, or did not maintain proper control of the motor vehicle; and
2. Such failure was the sole proximate cause or proximate contributing cause of plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of evidence in this case, then your verdict shall be for the defendant as to this theory of liability.

NOTES TO FORM

Practice Notes

Youngblood v. Monteith, 340 So. 2d 4 (Miss. 1976); Robertson v. Welch, 242 Miss. 110, 134 So. 2d 491 (1961).

§ 18:3 Operator's duty to inspect vehicle

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the operator of a motor vehicle has a duty to exercise reasonable care in the inspection of *[his/her]* vehicle to discover and correct any defects which could impair its safe operation.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The defendant, ________ *[name of defendant]*, operated a ________ *[describe vehicle]* equipped with defective ________ *[describe defect]* which impaired the vehicle's safe operation; and
2. This defect could have been discovered by the exercise of reasonable care in inspecting the ________ *[describe vehicle]*; and
3. ________ *[Name of defendant]* failed to discover this defect and take measures reasonably calculated to prevent injury; and
4. This defect was the sole proximate cause or proximate contributing cause of ________ *[name of plaintiff]*'s injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Southwest Mississippi Elec. Power Ass'n v. Harragill, 254 Miss. 460, 182 So. 2d 220 (1966); Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 108 So. 2d 409 (1959).

§ 18:4 Operator's duty to anticipate movements of children

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The operator of a motor vehicle who observes a child of tender years near the roadway has a duty to anticipate that the child might move on to the roadway, and must take measures reasonably calculated to prevent injuring the child.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The defendant, ________ *[name of defendant]*, observed or should reasonably have observed the child, ________ *[name child]*, along ________ *[state location of child]*; and
2. The defendant failed to take measures reasonably calculated to prevent injuring the child; and
3. The defendant's failure to take those measures was the sole proximate cause or proximate contributing cause of child's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Bland v. Briggs, 512 So. 2d 894 (Miss. 1987); McGee v. Bolen, 369 So. 2d 486 (Miss. 1979).

§ 18:5 Simultaneously approaching intersection—No stop signs or traffic control devices

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that when two vehicles enter an intersection from different highways at the same time, the operator of the vehicle on the left is under a duty to yield the right-of-way to the vehicle on the right.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The vehicles operated by ________, the plaintiff, and ________, the defendant, entered the intersection of ________ *[describe intersection]* at the same time; and
2. The plaintiff's vehicle was to the right of the defendant's vehicle; and
3. The defendant failed to yield the right-of-way to the plaintiff; and
4. The defendant's failure to yield was the sole proximate cause or a proximate contributing cause of the plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 63-3-801.

§ 18:6 Imputation of minor's negligence to parents

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. On or about *[date of incident]*;
2. *[Name of minor]* operated a motor vehicle on *[name of highway]*; and
3. While operating this vehicle, *[name of minor] [failed to exercise reasonable care for the safety of [name of plaintiff]/ willfully conducted [himself/herself] improperly by [description of actions]]*; and
4. *[Name of minor]*'s *[failure to exercise reasonable care/ willful misconduct]* was the sole proximate cause or proximate contributing cause of plaintiff's injuries; and
5. *[Name of minor]*, at the time *[he/she]* caused the plaintiff's injuries, was:
    a. Less than 17 years of age; and
    b. Operating under a *[license/permit]*; and
6. *[Name of defendant]* did sign the application for *[name of minor]* to get *[his/her] [license/permit]*;

then your verdict will be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then you shall find for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. §§ 63-1-23 to 63-1-27.

Warren ex rel. Warren v. Glascoe, 852 So. 2d 634 (Miss. Ct. App. 2003), aff'd, 880 So. 2d 1034 (Miss. 2004); Houston v. Holmes, 202 Miss. 300, 32 So. 2d 138 (1947).

§ 18:7 Vehicle approaching intersection—No stop or traffic control devices

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The operator of a vehicle approaching an intersection is under the duty to yield the right-of-way to a vehicle which has already entered the intersection from a different highway.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The vehicle operated by ________ *[name of defendant]*, the defendant, was approaching the intersection of ________ *[describe intersection]* at the time that the vehicle operated by ________ *[name of plaintiff]*, the plaintiff, had already entered the intersection from a different highway; and
2. The defendant failed to yield the right-of-way to the plaintiff's vehicle; and
3. The defendant's failure to yield was the sole proximate cause or proximate contributing cause of the plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 63-3-801.

§ 18:8 Authorized emergency vehicles—Definition

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the term "authorized emergency vehicle" includes every vehicle of the fire department, every police vehicle, every 911 Emergency Communications District vehicle, and every ambulance and emergency vehicle of municipal departments or public service corporations that are designed or authorized by the commission or the chief of police of an incorporated city.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 63-3-103(d).

§ 18:9 Right-of-way—Vehicle entering or crossing highway from private road or driveway

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the operator of a vehicle about to enter or cross a highway from a private road or driveway is under a duty to yield the right-of-way to all vehicles approaching on the highway so close as to constitute an immediate hazard.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The vehicle operated by ________ *[name of defendant]*, the

defendant, was about to enter or cross ______ *[name of highway]* from a private road or driveway at a time when the vehicle operated by ______ *[name of plaintiff]*, the plaintiff, was approaching on the highway so close as to constitute an immediate hazard; and

2. The defendant failed to yield the right-of-way to the plaintiff's vehicle; and
3. The defendant's failure to yield was the sole proximate cause or proximate contributing cause of the plaintiff's injuries;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 63-3-807.

§ 18:10 Willful, wanton or reckless operation of a motor vehicle

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Willful or wanton or reckless operation of a motor vehicle is an intentional act done either with knowledge that serious injury to another will probably result, or with utter disregard for the possible results of the act and for the safety and rights of others.

Therefore, if you find from a preponderance of the evidence in this case that:

1. The defendant, ______ *[name of defendant]*, operated a motor vehicle in such a manner as to show a disregard of a known serious danger; or

2. The defendant, ________ *[name of defendant]*, made an extreme departure in quality and degree from the ordinary standards of care while operating a motor vehicle; and
3. This was the sole proximate cause or proximate contributing cause of the plaintiff's injuries;

then your verdict shall be for the plaintiff and you may include punitive damages.

However, if you believe that the plaintiff has failed to prove any one of these elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35 (Miss. 1989); Perrett v. Johnson, 253 Miss. 194, 175 So. 2d 497 (1965); Dry v. Ford, 238 Miss. 98, 117 So. 2d 456 (1960).

§ 18:11 Pedestrians

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. Plaintiff, ________ *[name of plaintiff]*, was attempting to walk across ________ *[name of roadway]* at a point other than within a marked crosswalk; and

2. At the time plaintiff was about to walk across the roadway, the vehicle of the defendant, ________ *[name of defendant]*, was approaching on the roadway at a point so close to the plaintiff's place of intended crossing as to constitute an immediate hazard to the plaintiff entering and crossing said roadway; and

3. The plaintiff failed to yield the right-of-way to the approaching vehicle of the defendant and entered and attempted to cross said roadway; and

4. The defendant, upon discovering the plaintiff ______ *[about to enter the roadway or in the roadway ahead of [him/her]]* ______ *[sounded [his/her] horn and]* exercised due care to avoid colliding with the plaintiff; and

5. The failure of the plaintiff to yield the right of way to the vehicle of the defendant was the sole proximate cause of the plaintiff being struck by defendant's vehicle;

then you shall find for the defendant.

NOTES TO FORM

Practice Notes

Hood v. Oakley, 519 So. 2d 1236 (Miss. 1988); Smith v. Walton, 271 So. 2d 409 (Miss. 1973).

§ 18:12 Automobile driver not absolute insurer

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.   Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the driver of an automobile is not absolutely liable to anyone under any circumstances for injury occasioned by *[his/her]* vehicle. But the driver must exercise ordinary care to avoid injury to persons or property.

Therefore, if you find from a preponderance of the evidence that the defendant, ______ *[name of defendant]*, had reasonable control of *[his/her]* vehicle under the circumstances, then you must find for the defendant.

However, if you find that the defendant, ______ *[name of defendant]*, failed to exercise ordinary care to avoid injury, then you must find for the plaintiff.

Chapter 19

Will Contests

§ 19:1 Requirements
§ 19:2 Attestation
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§ 19:4 Undue influence
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Research References

West's Key Number Digest

Wills ⚷203 to 434

Treatises and Practice Aids

Encyclopedia of Mississippi Law §§ 13:1 et seq.
Miss. Civ. Proc. §§ 12:1 et seq., 14:1 et seq., 14A:1 et seq.
Miss. Trial Handbook §§ 34:1 et seq.

Trial Strategy

Instructing the Jury—Pattern Instructions, 6 Am. Jur. Trials 923
Selecting the Jury—Defense View, 5 Am. Jur. Trials 247
Selecting the Jury—Plaintiff's View, 5 Am. Jur. Trials 143

Forms

Am. Jur. Pleading and Practice Forms, Wills §§ 19 to 31, 233 to 416

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§ 19:1 Requirements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that in a will contest, the proponent must show by a preponderance of the evidence that:

1. The testator, ________ *[name of testator]*, acknowledged and declared in the presence of two witnesses that the will was in fact his/her will;
2. The witnesses signed the will in the presence of the testator, ________ *[name of testator]*; and
3. That the testator, ________ *[name of testator]*, signed the document by signature or made a mark meant as a signature placed anywhere on the document, or expressly directed someone else to sign it in his/her presence and adopted it as his/her signature.

If you find that the proponent, ________ *[name of proponent]*, has shown the above elements by a preponderance of the evidence, then your verdict shall be for the proponent.

If, however, you find that the proponent, ________ *[name of proponent]*, has failed to prove any of these elements by a preponderance of the evidence, then your verdict shall be for the contestant, ________ *[name of contestant]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-1.

Matter of Estate of Guthrie, 475 So. 2d 819 (Miss. 1985); Estate of Lawler v. Weston, 451 So. 2d 739 (Miss. 1984); Rand v. Moore, 414 So. 2d 885, 32 U.C.C. Rep. Serv. 1539 (Miss. 1981); Matter of McKellar's Estate, 380 So. 2d 1273 (Miss. 1980); Estate of Jefferson v. Moore, 349 So. 2d 1032 (Miss. 1977); Batchelor v. Powers' Estate, 348 So. 2d 776 (Miss. 1977); Chapman v. Chapman, 264 So. 2d 395 (Miss. 1972).

§ 19:2 Attestation

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Attestation is the act of witnessing a written document, at the request of the party making it, and signing it as a witness. Accordingly, you are instructed that an attested will is a will which has been attested to by witnesses who have signed their names on the will and have certified that the testator actually signed the will or instructed a third party to sign it, and that the testator had the capacity to execute a will. Such witnesses are referred to as attesting witnesses.

The testator does not have to sign the document in the presence of the attesting witnesses in order for the document to be a valid will. If the will is not signed in their presence, however, the witnesses must be aware that the testator actually executed the will. This knowledge can be obtained by the testator informing the witnesses that the document is testamentary.

A will that is not written in the handwriting of the testator must be attested.

Therefore, if you find from a preponderance of the evidence that:

1. The will was witnessed and signed by two witnesses;
2. The witnesses certified that either the testator, ________ *[name of testator]*, or someone at his/her request, signed the will; and
3. The witnesses certified that the testator, ________ *[name of testator]*, had the capacity to execute a will;

then your verdict shall be for the proponent of the will.

However, if you find that the proponent has failed to prove any of these elements, then your verdict shall be for the contestant, ________ *[name of contestant].*

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-1.

Matter of McKellar's Estate, 380 So. 2d 1273 (Miss. 1980); Estate of Jefferson v. Moore, 349 So. 2d 1032 (Miss. 1977); Batchelor v. Powers' Estate, 348 So. 2d 776 (Miss. 1977); In re Briscoe's Estate, 293 So. 2d 6 (Miss. 1974).

§ 19:3 Testamentary capacity

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In order for a document to be a valid will, the testator must have a sound and disposing mind at the time that *[he/she]* executed the will. You are instructed that a person has a sound and disposing mind if *[he/she]* is capable of understanding and appreciating in a general way:

1. The nature and effect of *[his/her]* act;
2. The natural objects or persons of *[his/her]* bounty and their relation to *[him/her]*;
3. The nature and extent of *[his/her]* property and *[his/her]* desires concerning its distribution. There is no requirement that a document accomplish a natural, reasonable, or just distribution of the testator's property.

If you find from a preponderance of the evidence that the testator, ________ *[name of testator]*, had these mental capabilities, then you shall find for the proponent. However, if you find that the testator lacked such capabilities, then you shall find for the contestant, ______ *[name of contestant].*

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-1.

Matter of Last Will and Testament of Dickey, 542 So. 2d 903 (Miss. 1989); Matter of Estate of Edwards, 520 So. 2d 1370 (Miss. 1988); Lee v. Lee, 337 So. 2d 713 (Miss. 1976); In re Briscoe's Estate, 293 So. 2d 6 (Miss. 1974); Wallace v. Harrison, 218 Miss. 153, 65 So. 2d 456 (1953).

§ 19:4 Undue influence

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A will executed by a testator, while under the undue influence of another is invalid. Undue influence is conduct which destroys the testator's free agency and substitutes the will of another for that of the testator. Every kind of influence which one person has over another is not, in the sense of the law, undue influence. That influence exerted by means of advice, arguments, persuasions, solicitations, suggestion, or entreaty is not undue unless it is so demanding and persistent that it operates to subdue and subordinate the testator's will and to take away *[his/her]* free agency.

In order to set aside a will on the ground of undue influence, the evidence must show that the will was not the will of the testator but the will of the other person; in other words, the will of the testator was so dominated and controlled that it became the will of another person. The time when the undue influence is exercised is not necessarily controlling to defeat a will. The undue influence must operate directly on the testator's mind and control the disposition of property under the will at the time he or she executes the will.

The contestant, ______ *[name of contestant]*, asserts that the will of the testator, ________ *[name of testator]*, should be set aside because the proponent, ________ *[name of proponent]*, unduly influenced the testator in making his/her will. Therefore, if you believe from a preponderance of the evidence that the proponent, ________ *[name of proponent]*, ________ *[state essential facts showing undue influence]* and thereby substituted his/her will for the will of the testator, ________ *[name of testator]*, or destroyed the free agency of the testator in making his/her will, then your verdict shall be: "We, the jury, find for the contestants."

However, if you believe from a preponderance of the evidence that the testator, ________ *[name of testator]*, was not unduly influenced in making his/her will but exercised his/her will and acted as a free agent in making his/her will because ________ *[state essential facts showing lack of undue influence]*, then your verdict shall be: "We, the jury, find for the proponent."

NOTES TO FORM

Practice Notes

This instruction should be followed by the pattern instruction on undue influence.

Sanders v. Sanders, 126 Miss. 610, 89 So. 261 (1921); Scally v. Wardlaw, 123 Miss. 857, 86 So. 625 (1920); Woodville v. Pizzati, 119 Miss. 442, 81 So. 127 (1919).

Research References

Legal Encyclopedias

Am. Jur. 2d, Wills §§ 389 to 407
C.J.S., Wills §§ 221 to 261

§ 19:5 Influence—The confidential relationship doctrine

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

In a will contest where undue influence is an issue, the contestant may proceed on the confidential relationship doctrine. This doctrine does not replace the traditional doctrine of undue influence; it is an alternative approach to the traditional doctrine. A will contestant may establish a confidential relationship by showing the existence of a fiduciary relationship where there is confidence reposed on one side, and the resulting superiority and influence on the other. Proof that the beneficiary in the confidential relationship had been actively concerned in the preparation, procurement, or execution of the will is also necessary. However, there is no requirement that the relationship and duties between the parties be legal; they may be characterized as moral, social, domestic or even personal.

The will contestant has the burden of proving the existence of a confidential relationship. The contestant may show that there were suspicious circumstances in the making of the will or show that the testator depended on the beneficiary due to trust, age, or mental impairment, or active participation by the beneficiary in the procurement or preparation of the will. Once the contestant has met this burden, a presumption arises that the will was the result of undue influence. The proponent must then rebut the presumption with clear and convincing evidence that the testator acted with full knowledge and deliberation, and showed independent consent and action pursuant to independent counsel devoted wholly to the interest of the testator, and that the beneficiary acted in good faith.

The contestant, ________ *[name of contestant]*, asserts that the will of the testator, ________ *[name of testator]*, should be set aside because the proponent, ________ *[name of proponent]*, unduly influenced the testator, ________ *[name of testator]*, through the existence of a confidential relationship between the parties. If you find that a fiduciary relationship existed between the parties where there was confidence reposed on one side and resulted in superiority and influence on the other side, you must find that a confidential relationship existed.

Having found the existence of a confidential relationship, if you then believe that the proponent failed to show, by clear and convincing evidence, that the testator, ________ *[name of testator]*, acted with full knowledge and deliberation and showed independent consent and action, and failed to show that the proponent acted in good faith, you must find for the contestant, ________ *[name of contestant]*.

However, if you believe that the proponent did show, by clear and convincing evidence, that testator acted with full knowledge and deliberation and showed independent consent and action, and that the proponent acted in good faith, you must find for the proponent, ________ *[name of proponent]*.

NOTES TO FORM

Practice Notes

Matter of Will of Adams, 529 So. 2d 611 (Miss. 1988); Mullins v. Ratcliff, 515 So. 2d 1183 (Miss. 1987); Smith v. Estate of Harrison, 498 So. 2d 1231 (Miss. 1986); Will of Polk, 497 So. 2d 815 (Miss. 1986); In re Will and Estate of Varvaris, 477 So. 2d 273 (Miss. 1985); Harris v. Sellers, 446 So. 2d 1012 (Miss. 1984); McDowell v. Pennington, 394 So. 2d 323 (Miss. 1981); Davion v. Williams, 352 So. 2d 804 (Miss. 1977); Estate of Bilello, 317 So. 2d 916 (Miss. 1975); In re Bowen's Estate, 234 So. 2d 51 (Miss. 1970); Harding v. Harding's Estate, 185 So. 2d 452 (Miss. 1966); Croft v. Alder, 237 Miss. 713, 115 So. 2d 683 (1959).

§ 19:6 Codicils

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A codicil is a clause or clauses added to a will by the testator after the will has been executed. It may confirm, revoke, explain, alter, modify, add to, or subtract from any one or all of the provisions of the will. You are instructed that a valid codicil must contain all the requirements that a valid will must contain. You are further instructed that an execution of a valid codicil cures any defects contained in the original execution of the will. If you determine from a preponderance of the evidence that the document is a codicil or that the original will was republished by a valid codicil, then your verdict shall be for the proponent.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-1.
Hemphill v. Robinson, 355 So. 2d 302 (Miss. 1978).

§ 19:7 Holographic wills

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a holographic will is a document written entirely in the handwriting of the testator. In this case, the proponent, ________ *[name of proponent]*, asserts that ________ *[describe document]* is the holographic will of the testator, ________ *[name of testator]*.

Therefore, if you believe from a preponderance of the evidence that ________ *[describe writing]*:

1. Shows the testator's intent to dispose of the property at his/her death; and
2. The writing is completely in the handwriting of the testator; and
3. The writing is signed by the testator at the end of the document;

then you shall find for the proponent of the will.

However, if you find that the proponent, ________ *[name of proponent]*, has failed to prove any of these elements, you shall find for the contestant, ________ *[name of contestant]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-1.

Fair v. Harrison, 248 So. 2d 798 (Miss. 1971); In re Giles' Estate, 228 So. 2d 594 (Miss. 1969).

§ 19:8 Noncupative wills

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that a nuncupative will is an oral declaration made by the testator with the intent that the declaration is his/her will. Such an oral declaration can convey only personal property. If you find by a preponderance of the evidence that:

1. The testator, ________ *[name of testator]*, intended that the oral declaration was to constitute his/her will; and
2. The testator, ________ *[name of testator]*, made the oral declaration during his/her last sickness; and
3. The testator made the declaration at his/her residence some ten days prior to death, or that *[he/she]* became ill away from home and died before *[he/she]* was able to return; ________ *[and]*
4. ________ *[Two witnesses have testified that the testator called upon a person and informed the person that the declaration constituted his/her will]*;

then you must find for the proponent of the will.

If, however, you find that any of these elements are missing, your verdict shall be for the contestant.

NOTES TO FORM

Practice Notes

Paragraph 4 should be used only when the personal property exceeds $100.

Miss. Code Ann. §§ 91-5-15, 91-5-17, and 91-5-21.

§ 19:9 Revocation by subsequent writing

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the testator can revoke a will, or a clause thereof, by a later will, codicil, or declaration in writing, provided the testator possessed testamentary capacity, and was not under undue influence when the later document was executed. You are further instructed that the revocation must be expressed, clear, and unequivocal.

If you find from a preponderance of the evidence that:

1. The testator, ________ *[name of testator]*, executed a written will, codicil, or declaration revoking his/her will or a clause of his/her will; and
2. The subsequent document was executed subject to all the requirements of a valid will;

then your verdict shall be for the proponent.

However, if the proponent has failed to prove any of these elements, then your verdict shall be for the contestant, ________ *[name of contestant]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-3.

Trotter v. Trotter, 490 So. 2d 827 (Miss. 1986); Ramsey v. Robinson, 346 So. 2d 379 (Miss. 1977).

§ 19:10 Revocation by destroying, canceling or obliterating

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the testator, ________ *[name of testator]*, acting with the requisite testamentary capacity and free from undue influence, may revoke his/her will, or a clause thereof, by:

1. Destroying, canceling, or obliterating the document or clause thereof; or
2. Causing such destruction, cancellation, or obliteration to occur in his/her presence; and
3. Accomplishing the destruction with the intent to revoke the will.

If you find that the proponent, ________ *[name of proponent]*, has shown the above elements by a preponderance of the evidence, then your verdict shall be for the proponent.

If, however, you find that the proponent, ________ *[name of proponent]*, has failed to prove any of these elements by a preponderance of the evidence, then your verdict shall be for the contestant, ________ *[name of contestant]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-3.

Matter of Palmer's Will, 359 So. 2d 752 (Miss. 1978); Lane v. Woodland Hills Baptist Church, 285 So. 2d 901 (Miss. 1973); Livelar v. Arnold, 233 So. 2d 760 (Miss. 1970).

§ 19:11 Revocations and last wills—Presumptions

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The law recognizes certain presumptions arising from the inability to find a will, or the finding of a will in a mutilated condition. Among these are:

a. If a will is traced to the possession of the testator, ________ *[name of testator]*, or *[he/she]* had ready access to the will and the will cannot be found after his/her death, or it is found in a mutilated condition, it is presumed that *[he/she]* destroyed the will with an intent to revoke it. However, this presumption is inapplicable if the will was in existence at a time after which the testator ________ *[name of testator]* did not possess the capacity to revoke a will.

b. If a will is last traced to a party other than the testator ________ *[name of testator]* and the testator did not have ready access to it, then it is presumed that the will was lost and not revoked.

In the absence of other evidence, the law presumes that a testator's destruction or mutilation of a will signifies an intent to revoke it. However, this presumption may be rebutted by clear and convincing evidence.

NOTES TO FORM

Practice Notes

Matter of Estate of Mitchell, 623 So. 2d 274 (Miss. 1993) (proponent of lost will must prove each element by clear and convincing evidence to rebut presumption that lost will was destroyed with intent to revoke it); Deposit Guar. Nat. Bank v. Cotten, 420 So. 2d 242 (Miss. 1982); Matter of Palmer's Will, 359 So. 2d 752 (Miss. 1978); Willis' Estate v. Willis, 207 So. 2d 348 (Miss. 1968); James v. Barber, 244 Miss. 234, 142 So. 2d 21 (1962); Watkins v. Watkins, 142 Miss. 210, 106 So. 753 (1926); Hairston v. Hairston, 30 Miss. 276, 1855 WL 3978 (1855).

§ 19:12 Implied revocation by operation of law

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If a *[man/woman]* makes a will at a time when *[he/she]* is without children and if the will neither provides for nor mentions children *[he/she]* may hereafter have, then that will shall be of no effect if *[he/she]* has a child at the time of *[his/her]* death or if, when a man dies, his wife is pregnant. The will may be effective again if the child dies without having been married, without having issue capable of inheriting, and before reaching the age of 21 years. The will is of no effect if the child marries, has a child capable of inheriting, or reaches the age of 21. The estate descends to the child as if the testator died intestate.

If you find from a preponderance of the evidence that:

1. The testator made his/her will while he/she was without child or children; and
2. The will makes no mention of any child or children he/she might subsequently have; and
3. The testator, ________ *[name of testator]*, died and left a child or children, then the will made before the child or children's birth is of no effect during the child's lifetime, unless the child dies without having been married, or without children capable of inheriting, and before the child reaches age 21;

the will shall be void and you must find for the contestant, ________ *[name of contestant]*.

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 91-5-3.

Rasco v. Estate of Rasco, 501 So. 2d 421 (Miss. 1987); Trotter v. Trotter, 490 So. 2d 827 (Miss. 1986); McKnight v. McKnight, 267 So. 2d 315 (Miss. 1972); Guion v. Guion, 232 Miss. 647, 100 So. 2d 351 (1958); Clark v. Clark, 126 Miss. 455, 89 So. 4 (1921); Watkins v. Watkins, 88 Miss. 148, 40 So. 1001 (1906).

§ 19:13 Mistake

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

There are two ways the issue of mistake can arise in a will contest. A mistake in the execution arises when a testator is mistaken as to the contents of his/her will or as to the document signed. A mistake in the inducement arises when the testator is mistaken as to facts outside the will document which affect how *[he/she]* decides to dispose of property. For instance, the testator may be mistaken about the condition or amount of his/her property or the conduct of the beneficiaries. A will generally is not voided because of mistake in the inducement. But, if the issue of mistake arises because the will or clause thereof was mistakenly executed, then said will cannot be probated. The law, however, provides no remedy when a clause or provision is omitted by mistake.

If you find from a preponderance of the evidence that the will of testator, ________ *[name of testator]*, or a clause thereof was executed by mistake with regard to the contents of the will, the will cannot be probated and you must find for the contestant.

If you find from a preponderance of the evidence that the will of testator, ________ *[name of testator]*, or a clause thereof was not executed by mistake with regard to the contents of the will, the will must be probated.

NOTES TO FORM

Practice Notes

Mistake may be a ground for a wills contest only when there is a mistake as to the document signed or a mistake as to the contents of the will. When the mistake is to the nature of the document it will usually be so clear that it will never reach the jury. When the mistake is to the contents of the document, the problem of proof will be so great that a will can hardly be contested on this ground. In such a case the proponent is aided by the presumption that a person who signs a will knows that it is a will and knows its contents.

Crosby v. Alton Ochsner Medical Foundation, 276 So. 2d 661, 75 A.L.R.3d 853 (Miss. 1973).

§ 19:14 Lost wills

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The loss or destruction of the paper on which a will was written does not in itself invalidate the will. If an otherwise valid will is lost or destroyed after the death of the testator ________ *[name of testator]* it is nonetheless valid. Similarly, if during the testator ________ *[name of testator]*'s lifetime an otherwise valid will is lost or destroyed under circumstances that do not amount to a revocation, then it is still valid.

If you find from a preponderance of the evidence that the otherwise valid will of the testator ________ *[name of testator]* was lost or destroyed after his/her death, or under circumstances that did not constitute a revocation, you shall find for the proponent ________ *[name of proponent]*.

NOTES TO FORM

Practice Notes

Deposit Guar. Nat. Bank v. Cotten, 420 So. 2d 242 (Miss. 1982); Gaston v. Gaston, 358 So. 2d 376 (Miss. 1978); James v. Barber, 244 Miss. 234, 142 So. 2d 21 (1962).

Research References

Legal Encyclopedias

Am. Jur. 2d, Wills § 520

§ 19:15 Fraud

IN THE *[DESIGNATION OF COURT]* COURT OF

[NAME OF COUNTY], MISSISSIPPI

[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	}	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Fraud is a trick, deception or artifice which causes a person to dispose of his/her property or to do some act contrary to his/her wishes or to do some act in a way *[he/she]* would not have acted but for the fraud.

The contestant, ________ *[name of contestant]*, asserts that ________ *[name of proponent]* procured the making of the will of ________ *[name of testator]* by fraud.

To constitute fraud, the act complained of must:

1. Contain statements known to be false by ________ *[name of proponent]*, the maker of the statement; and
2. Contain statements made with the intent to deceive the testator ________ *[name of testator]*; and
3. These statements did deceive the testator ________ *[name of testator]*; and
4. Cause the testator ________ *[name of testator]* to act in reliance on the false statement; and
5. Cause the testator ________ *[name of testator]* to execute a will.

Therefore, if you find by clear and convincing evidence that the proponent ________ *[name of proponent]* made false statements to the testator, with the intent to deceive the testator, and that testator was deceived, and in acting in reliance on the false statement, executed a will, then your verdict shall be: "We, the jury, find for the contestant."

However, if any one of these elements has not been proved by clear and convincing evidence, then the will was not procured by fraud and your verdict shall be: "We, the jury, find for the proponent."

NOTES TO FORM

Practice Notes

Ard v. Ard, 438 So. 2d 1356 (Miss. 1983).

Frye v. Southern Farm Bureau Cas. Ins. Co., 915 So. 2d 486, 492 (Miss. Ct. App. 2005) (Fraud must be established by clear and convincing evidence.) (citations omitted).

Weems, Wills and Administration of Estates in Mississippi § 8:19 (3d ed.) (The burden of proof of fraud is generally on the party alleging it, and the proof must be clear and convincing).

Research References

Legal Encyclopedias

Am. Jur. 2d, Wills § 379
C.J.S., Wills § 354

Additional References

1 Page on Wills §§ 14.1 to 14.9 (1960)
Atkinson, Law of Wills, §§ 56 to 57 (1953)

§ 19:16 Fraud—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

Fraud is a trick or deception which causes a person to dispose of *[his/her]* property or to do some act contrary to *[his/her]* wishes or to do some act in a way *[he/she]* would not have acted but for the fraud.

The contestant, *[name of contestant]*, asserts that *[name of proponent]* procured the making of the will of *[name of testator]* by fraud. To constitute fraud, the contestant, *[name of contestant]*, must prove by clear and convincing evidence:

1. *[Name of proponent]* stated *[description of representation]*;
2. This representation was false;
3. This representation concerned a material fact;
4. *[Name of proponent]* did know or should have known that the representation was false;
5. *[Name of proponent]* did intend for the testator, *[name of testator]* to act upon the representation in making *[his/her]* will;
6. *[Name of testator]* did not know that the representation was false; and
7. *[Name of testator]* did execute *[his/her]* will in reliance on the false representation.

Therefore, if you find that the contestant, *[name of contestant]*, has proved the above elements by clear and convincing evidence, then your verdict shall be: "We, the jury, find for the contestant."

However, if any one of these elements has not been proved by clear and convincing evidence, then your verdict shall be: "We, the jury, find for the proponent."

NOTES TO FORM

Practice Notes

State v. Bayer Corp., 32 So. 3d 496, 501 (Miss. 2010) (Elements of fraud are: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on the representation's truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury).

Frye v. Southern Farm Bureau Cas. Ins. Co., 915 So. 2d 486, 492 (Miss. Ct. App. 2005) (Fraud must be established by clear and convincing evidence.) (citations omitted).

Weems, Wills and Administration of Estates in Mississippi § 8:19 (3d ed.) (The burden of proof of fraud is generally on the party alleging it, and the proof must be clear and convincing).

§ 19:17 Bequests

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

A bequest is a gift by will of personal property. A devise is a disposition by will of realty. If a testator bequeaths or devises his/her estate to his/her child or descendant, and the child or descendant dies before the testator, the gift to that person does not lapse. The devise or bequest passes to the children or descendant of such devisee or legatee as if the devisee or legatee had survived the testator and had died intestate.

If you find by a preponderance of the evidence that the testator, ________ *[name of testator]*, bequeathed or devised a portion of his/her estate to his/her child or descendant, and said child or descendant predeceased the testator and left a child or descendant, the gift vests in the child or descendant of the devisee or legatee, and you must find for the child or descendant of the devisee or legatee.

If you do not find from a preponderance of the evidence that the testator, ________ *[name of testator]*, bequeathed or devised a portion of his/her estate to his/her child or descendant, and said child or descendant did not predecease the testator and did not leave a child or descendant, the gift cannot vest in the child or descendant of the devisee or legatee, and you must find for the proponent, ________ *[name of proponent]*.

NOTES TO FORM

Practice Notes

Moffett v. Howard, 392 So. 2d 509 (Miss. 1981); Kullman v. Dreyfus' Estate, 201 Miss. 887, 30 So. 2d 81 (1947); Neblett v. Neblett, 112 Miss. 550, 73 So. 575 (1916).

§ 19:18 Form of verdict

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find that the document alleged to be a will meets all the requirements necessary for a valid will, ________ *[list requirements]* then the form of your verdict shall be:

"We, the jury, find for the proponent."

If you find that there is any requirement necessary for a valid will which the document presented does not fulfill, the form of your verdict shall be:

"We, the jury, find for the contestant."

NOTES TO FORM

Research References

West's Key Number Digest
Wills ⚷329(1)

Legal Encyclopedias
C.J.S., Wills §§ 775, 776

Chapter 20

Other Intentional Torts

§ 20:1 Alienation of affection—Elements
§ 20:2 —Marital relationship
§ 20:3 —Malice presumed
§ 20:4 —Damages
§ 20:5 Fraud—Elements
§ 20:6 Intentional infliction of emotional distress—Elements
§ 20:7 Conversion—Elements

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§ 20:1 Alienation of affection—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The Court instructs the jury that the tort of alienation of affection is comprised of three elements. The elements of the tort of alienation of affections are as follows:

1. Wrongful conduct of the Defendant;
2. Loss of affection or consortium; and
3. Causal connection between the conduct and loss.

If *[name of plaintiff]* has proved the above three elements of the tort of alienation of affections by a preponderance of the evidence, then you must return a verdict for the plaintiff on *[his/ her]* claim for alienation of affections.

If *[name of plaintiff]* has failed to prove any one or more of the above listed elements, then you must return a verdict for the defendant.

NOTES TO FORM

Practice Notes

Pierce v. Cook, 992 So. 2d 612, 626 (Miss. 2008).

§ 20:2 Alienation of affection—Marital relationship

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The Court instructs the jury that *[name of plaintiff]* was entitled to be protected in *[his/her]* marital relationship without interference from *[name of defendant]*.

The interest protected is personal to the spouse and arises out of the marriage relation, and includes the society, companionship, love, affection, aid, services, support, sexual relations, and the comfort of *[his/her]* spouse as special rights and duties growing out of the marriage covenant.

NOTES TO FORM

Practice Notes

Pierce v. Cook, 992 So. 2d 612 (Miss. 2008); Simmons v. Strickland, 76 So. 3d 178 (Miss. Ct. App. 2011).

§ 20:3 Alienation of affection—Malice presumed

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The Court instructs the jury that if you find from the preponderance of the evidence that *[name of defendant]* committed adultery with *[name of plaintiff]*'s spouse, then the Court instructs you that malice is presumed.

NOTES TO FORM

Practice Notes

Pierce v. Cook, 992 So. 2d 612 (Miss. 2008); Simmons v. Strickland, 76 So. 3d 178 (Miss. Ct. App. 2011).

§ 20:4 Alienation of affection—Damages

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant],* Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The court instructs you that in determining the amount of damages suffered by the plaintiff resulting from the alienation of *[his/her]* spouse's affections, you should consider the following elements of damage as have been proved by a preponderance of the evidence in this case:

1. The loss of society, companionship, love and affection;
2. The loss of aid, services, and physical assistance provided by the spouse;
3. The loss of sexual relations; and
4. The loss of participation together in the activities, duties and responsibilities of making a home.

NOTES TO FORM

Practice Notes

Pierce v. Cook, 992 So. 2d 612, 626 (Miss. 2008).

§ 20:5 Fraud—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v.

[Name of defendant],
Defendant.

Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find by clear and convincing evidence in this case that:

1. *[Name of defendant]* represented *[description of representation]*;
2. That the representation was false;
3. That the representation was material;
4. That *[name of defendant]* did know that the representation was false or was ignorant of its truth;
5. That *[name of defendant]* did intend that the representation should be acted upon by *[name of plaintiff]*;
6. That *[name of plaintiff]* did not know that the representation was false;
7. That *[name of plaintiff]* did rely on the representation's truth;
8. That *[name of plaintiff]* did have a right to rely on the representation; and
9. That *[name of plaintiff]* suffered damages as a result of *[his/her]* reliance on the representation,

then your verdict shall be for the Plaintiff.

However, if you believe that the plaintiff has failed to show any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

State v. Bayer Corp., 32 So. 3d 496, 501 (Miss. 2010) (Elements of fraud are: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on the representation's truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury).

Frye v. Southern Farm Bureau Cas. Ins. Co., 915 So. 2d 486, 492 (Miss. Ct. App. 2005) (Fraud must be established by clear and convincing evidence.) (citations omitted).

§ 20:6 Intentional infliction of emotional distress—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. *[Name of defendant]* acted willfully or wantonly towards *[name of plaintiff]* by *[description of defendant's actions]*;
2. That the defendant's *[act/acts]* *[is/are]* *[one/ones]* which evoke outrage or revulsion in civilized society;
3. That the *[act/acts]* was/were directed at or intended to cause harm to *[name of plaintiff]*;
4. *[Name of plaintiff]* suffered severe emotional distress as a direct result of the *[act/acts]* of the defendant; and
5. Such resulting emotional distress was foreseeable from the intentional *[act/acts]* of the defendant;

then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

Pierce v. Cook, 992 So. 2d 612, 626–27 (Miss. 2008). See Peoples Bank & Peoples Bank and Trust Co. v. Cermack, 658 So. 2d 1352, 1365, 29 U.C.C. Rep. Serv. 2d 416 (Miss. 1995) (jury instruction for intentional infliction of emotional distress must instruct the jury that it has to find that the defendant' s conduct was wanton or willful and that it would evoke outrage or revulsion) .

§ 20:7 Conversion—Elements

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

If you find from a preponderance of the evidence in this case that:

1. *[Name of plaintiff]* owned *[description of property]*; and

2A. *[Name of defendant]* wrongfully possessed the *[description of property]*, or

2B. *[Name of defendant]* exercised dominion in exclusion or defiance of the owner's right over the *[description of property]*, or

2C. *[Name of defendant]* used the *[description of property]* unauthorized and caused injury to the *[description of property]*, or

2D. *[Name of defendant]* wrongfully detained the *[description of property]* after the owner's demand, then your verdict shall be for the plaintiff.

However, if you believe that the plaintiff has failed to show any one of the above elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

NOTES TO FORM

Practice Notes

See First Investors Corp. v. Rayner, 738 So. 2d 228, 234-35, 38 U.C.C. Rep. Serv. 2d 963 (Miss. 1999).

Walker v. Brown, 501 So. 2d 358, 361 (Miss. 1987) (Conversion requires an intent to exercise dominion or control over goods which is inconsistent with the true owner's right.).

Mississippi Motor Finance, Inc. v. Thomas, 246 Miss. 14, 20, 149 So. 2d 20, 23 (1963) (citations omitted) (It is well settled that the acts alleged to constitute a conversion must be positive and tortious. . . . To make out a conversion, there must be proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand.).

Chapter 21

Eminent Domain

§ 21:1 Eminent Domain—General
§ 21:2 —Party may take by eminent domain
§ 21:3 —Fair market value
§ 21:4 — —Viewing the property
§ 21:5 —Before and after rule
§ 21:6 —Verdict form

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§ 21:1 Eminent Domain—General

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The court instructs the jury that eminent domain is the right of the government to take private property for public use. However, the government is required to pay the property owner just and due compensation for the property.

NOTES TO FORM

Practice Notes

Harrison v. Mississippi Transp. Com'n, 57 So. 3d 622 (Miss. 2011).

§ 21:2 Eminent Domain—Party may take by eminent domain

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The court instructs the jury that *[name of plaintiff]* has the right of eminent domain under Mississippi law, which allows it to take *[name of defendant]*'s property for public use, upon payment of due compensation.

NOTES TO FORM

Practice Notes

Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 494 (Miss. 2010).

§ 21:3 Eminent Domain—Fair market value

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff, v. *[Name of defendant]*, Defendant.	Case No. *[case number]*

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

You are instructed that the term "fair-market value" as used in these instructions means the price land would bring if it were offered for sale in the open market by a seller who is not under an obligation to sell, for a price paid by someone who is not under an obligation to buy the land, and where the buyer and seller have reasonable knowledge of the material facts concerning the property.

NOTES TO FORM

Practice Notes

Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 494 (Miss. 2010). See Mississippi Civil Jury Instruction § 10:33.

§ 21:4 Eminent Domain—Fair market value—Viewing the property

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff], Plaintiff,	
v.	Case No. *[case number]*
[Name of defendant], Defendant.	

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The court instructs the jury that having been permitted to make an inspection of the property in question, you have a duty to exercise your own judgment in determining the fair market value of the property, based on your observation, together with all of the evidence that has been admitted at the trial. All of this evidence and your inspection is for the purpose of enabling you to form a correct judgment as to the fair-market value of the property in question, and in your deliberations, you must consider all of the evidence that you believe credible and give it such weight as in your judgment you deem it entitled.

NOTES TO FORM

Practice Notes

Mississippi Transp. Com'n v. Buchanan, 99 So. 3d 230 (Miss. Ct. App. 2012). Mississippi Code Ann § 13-5-91.

§ 21:5 Eminent Domain—Before and after rule

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

The court instructs the jury that that measure of damages in this cause is the difference between the fair-market value of the property before the taking and the fair-market value of what remains after the property is taken for public use, or the difference in the fair-market value of the entire tract before and after the taking of the property for public use without considering general benefits or injuries resulting from the use to which the land taken is to be put that is shared by the general public.

NOTES TO FORM

Practice Notes

Mississippi Transp. Com'n v. Buchanan, 99 So. 3d 230 (Miss. Ct. App. 2012).

§ 21:6 Eminent Domain—Verdict form

IN THE *[DESIGNATION OF COURT]* COURT OF
[NAME OF COUNTY], MISSISSIPPI
[DESIGNATION OF DISTRICT] JUDICIAL DISTRICT

[Name of plaintiff],
Plaintiff,

v. Case No. *[case number]*

[Name of defendant],
Defendant.

INSTRUCTION NO. *[NUMBER OF INSTRUCTION]*

When nine of you agree on the verdict, the verdict of the jury shall be in the following form:

"We, the jury, find that the defendant, *[name of defendant]* will be damaged by the acquisition of *[his/her/its]* property for the public use, in the sum of $*[dollar amount of sum]*."

NOTES TO FORM

Practice Notes

Miss. Code Ann. § 11-27-23. See M.R.C.P. 48.

See Mississippi Civil Jury Instruction § 10:39.

[illegible]

[illegible] that [illegible] class of documents in [illegible] between [illegible] of the [illegible] fundamental [illegible] public [illegible] little [illegible]

[illegible]

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